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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 567.

SPIELMAN MOTOR SALES CO. INC.,
Complainant-Appellant,

vs.

WILLIAM C. DODGE, as District Attorney of New York County, State of New York,
Defendant-Appellee.

COMPLAINANT-APPELLANT'S BRIEF.

Statement.

The opinion of the Statutory Court in this case is reported in 8 Fed. Supp. 437, Advance Sheets, December 10th, 1934 (R. 265).

The Facts.

Appellant commenced the above action for a permanent injunction restraining and enjoining the defendant herein, the District Attorney of New York County of the State of New York, from carrying out a threat to criminally prosecute the appellant for the alleged violation of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade (Exhibit A, R. 16). The alleged violation constitutes a misdemeanor under the laws of the State of New York, by virtue of Chapter 781 of the Laws of 1933 of the State of New York, commonly known and designated in said State as the "Schuckno Act" or the New York State Industrial Recovery Act (Exhibit

B, R. 33). The said Act provides for punishment of any violation of any Code of Fair Competition, at the rate of $500 for each violation, and is cumulative in that each day of violation constitutes a separate crime (R. 34).

The basis of said action is that the said "Schackno Act" and the Code of Fair Competition for the Motor Vehicle Retailing Trade, more particularly the provisions of Article IV of said Code, are void, invalid and unconstitutional, being in contravention and derogation of the United States Constitution, more particularly the Fourteenth Amendment thereof.

Jurisdiction of this cause is based upon the following authorities:

Tyson v. *Banton*, 273 U. S. 418;
Packard v. *Banton*, 264 U. S. 140;
Terrace v. *Thompson*, 263 U. S. 197;
Truax v. *Raich*, 239 U. S. 33;
Cavanaugh v. *Looney*, 248 U. S. 453;
Ex Parte Young, 209 U. S. 123.

In addition to having raised a Federal Constitutional question, the appellant raised a local Constitutional question, contending that the threatened prosecution under said "Schackno Act" was violative of its constitutional rights under the New York State Constitution, in the manner which will be more fully discussed in this brief, and by virtue thereof, vested the District Court with power to determine all the questions in the case, local as well as federal. This is in accordance with the decisions of this Court:

Louisville & N. R. Co. v. *Garrett*, 231 U. S. 298;
Van Dyke v. *Geary*, 244 U. S. 39;
Siler v. *Louisville & N. R. Co.*, 213 U. S. 175.

Simultaneously with the institution of the action, appellant, by Order to Show Cause (R. 3) moved before the

District Court for a preliminary injunction, on notice to the defendant-appellee, the Attorney General, and the Governor of the State of New York, pursuant to the provisions of Section 380, Title 28, of the United States Code.

A statutory court of three Judges, consisting of one Judge of the Circuit Court of Appeals, Second Circuit, and two District Judges, was duly convened to hear and determine the said application for a preliminary injunction. The appellee moved simultaneously to dismiss the Bill of Complaint.

The statutory Court, thus convened, rendered its opinion wherein it denied the appellant's application for a preliminary injunction, and granted the appellee's motion to dismiss the Bill of Complaint. A final decree was entered accordingly.

After an appeal was duly taken to this Court, by Order allowing the appeal (R. 274), based upon an Assignment of Errors, and a transcript of the Record filed with this Court, it was determined by Counsel for the respective parties to the action, as well as Counsel to the Attorney General and Counsel to the Governor of the State of New York, that the preliminary hearing be deemed a final hearing on the merits, and that the respective affidavits and exhibits submitted by the parties hereto on the application for a preliminary injunction, be deemed the testimony of the respective affiants as though the said affiants had orally testified with respect to the facts contained in their respective affidavits and exhibits.

It was agreed by written stipulation, upon which an order was duly entered and made part of the Record on this appeal, that Findings of Fact and Conclusions of Law be submitted to the said statutory Court and the Findings of Fact and Conclusions of Law made part of this Record, to sustain the final decree granted herein. This procedure was in reliance upon the decision of this Court in *Borden* v. *Baldwin*, 79 Law Ed. 130, No. 296, October Term 1934.

The appeal, therefore, is before this Court, from a final decree in favor of the appellee, based upon Findings of Fact and Conclusions of Law, in order that there may be a final determination of this case on the merits.

* * * * * * *

The appellant is engaged in the retail sale of new automobiles, more particularly the products of the Chevrolet Motor Company, and has been so engaged since 1923. It employs eighty employees and transacts its business in five localities all within the City and State of New York (R. 4, 5). In the establishment and conduct of its business, the appellant has expended vast and considerable sums of money, time and effort and has developed a good will among its customers and patrons of immeasurable value.

Subsequent to the enactment of the National Industrial Recovery Act, and on the 26th day of August, 1933, Chapter 781 of the Laws of 1933 of the State of New York, came into effect. The entire Act appears in the Record as Appellant's Exhibit B, at page 33.

Allegedly pursuant to the provisions of the National Industrial Recovery Act, a Code of Fair Competition for the Motor Vehicle Retailing Trade, which is set forth in full, beginning at page 16 of the Record, was approved by the President of the United States on October 3rd, 1933, to become effective November 1933. Subsequently, and on or about the 3rd day of December, 1933, a certified copy of the said Code of Fair Competition was filed in the office of the Secretary of State of New York, pursuant to the provisions of Chapter 781 of the Laws of 1933 of the State of New York, and pursuant thereto, became "the standard of fair competition" for the automobile retail trade in the State of New York.

On the 7th day of July, 1934, the defendant, as District Attorney of New York County of the State of New York, openly, publicly and admittedly threatened and proclaimed to the appellant that he was preparing to crimi-

nally prosecute the appellant by reason of the alleged violation of Article IV, Subdivision A, and also for the alleged violation of Article IV, Subdivision B, Paragraphs 1 and 2 of the Code of Fair Competition for the Motor Vehicle Retailing Trade. The entire Code is set forth as Exhibit A, and appears in the Record at page 16.

By the provisions of Article IV, Subdivision A, an automobile dealer is prohibited from allowing to a prospective customer on a trade-in automobile, a value in excess of a maximum figure established and ascertained as provided by the provisions of Article IV, Subdivision A, of the Code.

Article IV, Subdivision B, paragraph 1 thereof, prohibits an automobile dealer from selling a new car at retail to a customer for less than factory list price, plus certain extra charges for equipment, transportation, etc. Paragraph 2 of the said Subdivision, prohibits a dealer from giving "any discount, gratuity, commission, service or accessory, to a customer or his agent, for the purpose of inducing a customer or his agent to purchase a car".

When these threats were made, this action was commenced to restrain the District Attorney from carrying out the said threat to criminally prosecute the appellant for the said violation, on the ground that said prosecution, if culminated, would deprive the appellant of its constitutional rights guaranteed to it by the Constitution of the United States, more particularly but not exclusively the Fourteenth Amendment thereto, and the New York State Constitution.

Tyson v. *Banton*, 273 U. S. 418;
Packard v. *Banton*, 264 U. S. 140;
Terrace v. *Thompson*, 263 U. S. 197;
Truax v. *Raich*, 239 U. S. 33;
Cavanaugh v. *Looney*, 248 U. S. 453;
Ex Parte Young, 209 U. S. 123.

POINT I.

The National Industrial Recovery Act is unconstitutional.

A. The matters sought to be regulated therein are beyond the constitutional jurisdiction of Congress, and no warrant of authority exists in Congress to regulate the subject matter embraced therein.

The powers granted unto Congress are specifically enumerated in the Constitution (Article 1, Section 8 of the United States Constitution), and those powers not expressly granted nor implied therefrom, are reserved to the respective states and the people and may be exercised only by them by virtue of the Ninth and Tenth Amendments to the Constitution.

McCullough v. *Maryland*, 4 Wheat. 316;
In re Rahrer, 140 U. S. 545;
Turner v. *Williams*, 194 U. S. 295;
Keller v. *United States*, 213 U. S. 138;
Martin v. *Hunter's Lessee*, 14 U. S. (1 Wheat.) 304;
Newberry v. *United States*, 256 U. S. 232.

Any legislation by Congress, beyond the limits of the powers expressly delegated to it or implied therefrom, would be trespassing upon the respective rights of the States or the people, and would therefore be in direct contravention of the supreme law of the land.

Gordon v. *United States*, 117 U. S. 705;
Civil Rights Cases, 109 U. S. 3.

We must therefore be confined to the precise powers expressly granted to Congress or logically implied therefrom

to determine the existence of the power of Congress to legislate in the particular respects found in the National Industrial Recovery Act (Title 15 of the United States Code) (48 Stat. 195).

In the Act herein challenged, by its declaration of policy, the Congress stated:

> "It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; *and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervisions, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.*" (Italics the writers.)

It will be observed that in this declaration of policy, the only subject matter over which Congress has legislative authority is the subject matter of interstate and foreign commerce (Section 8, Article 1 of the United States Constitution). It will be further observed that in declaring a purpose to provide for the general welfare the declaration of policy encompassed a vast field over which the Congress does not have any authority under the Constitution to legislate, either express or implied. It seems to have been the opinion of the author of the Act that the use of the words "provide for the general welfare" as introductory

to this vast sweep of power, would be sufficient justification of Congressional legislation. Undoubtedly the author was attempting to outline a legislative policy resting for its authority upon the general welfare clause of the Constitution, for certainly no student of the Constitution would say the Congress had authority under the Constitution, either express or implied, to promote the organization of industry generally, or cooperative action among trade groups, or to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, or to promote the fullest possible utilization of present productive capacity or industries, or to avoid undue restriction of production, or to increase the consumption of industrial and agricultural products by increasing purchasing power, or to reduce or relieve unemployment, or to improve standards of labor or otherwise rehabilitate industry and conserve natural resources. If, in some of these declared objectives, there were an element of interstate commerce clearly definable, the legislative authority of the Congress as to that might be justified; but there was no effort and apparently no purpose to distinguish in this declaration of policy the subjects which the Congress had constitutional authority to deal with and those which it did not have such constitutional authority to deal with.

Section 2, sub-division (a) of Title I provides that:

> "To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities,

duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended to fix the compensation of any officers and employees so appointed."

The single reference to anything which might be called a definition of subject-matter of the so-called legislation is one in which the language is used, "to effectuate the policy of this title". In other words, having declared a policy which specifically and inevitably goes outside of the field of interstate commerce and reaches and ramifies trade, industry, competitive practices, productive capacity, consumption of industrial and agricultural products, increased purchasing power, unemployment, standards of labor and the rehabilitation of industry it does not further distinguish or specify these subjects which it proposes legislatively to deal with, but simply declares that this policy shall be carried out by the President of the United States.

In Section 3 of Title I, under the head of "Codes of Fair Competition", it is provided that:

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title; *Provided*, that such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code

> or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

Clearly, this does not in the slightest degree limit the operation of the Act or the activity of the President, or the agencies which he may set up, to interstate commerce; *but clearly it comprehends all the classes of commerce, local, intrastate and interstate.*

Section 3 further provides:

> "(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended."

The object of this sub-division apparently was to place under the jurisdiction of the Federal Trade Commission those violations of code or codes which affected interstate

or foreign commerce, and the very fact that this sub-division (b) provides

> "Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended";

indicates clearly that the whole subject-matter was the whole of commerce, local, intrastate and interstate, and that it was the object of the author of the Act to segregate the transactions affecting interstate or foreign commerce from all other kinds of commerce and place them within the jurisdiction of the Federal Trade Commission Act. This will be made more manifest by the next sub-division of Section 3, which provides:

> "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of *any* code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

Here the Act reverts again to the *whole field of commerce and industry,* invests the District Courts of the United States with jurisdiction to prevent and restrain the violation of any code of fair competition and empowers the United States District Attorneys to institute proceedings to prevent and restrain such violations. *There is no distinction made in the sub-division between the classes of commerce, intrastate and interstate.*

It has been claimed and was so announced at the beginning, that this whole Industrial Recovery Act was permissive in character and the introductory section, under the

title "Codes of Fair Competition", seems to have misled many into the belief that the application to the President by any trade or industrial association or group was optional and that it was a voluntary, cooperative plan, receiving governmental sanction and creating what has been called a "partnership with the government". But the next subdivision of Section 3 sets all of that at rest, for it provides:

> "Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent *in any trade or industry or subdivision thereof*, and if no code of fair competition theretofore has been approved by the President, the President, after such public notice and hearing as he shall specify, *may prescribe and approve* a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section." (Italics the writer's.)

Here the glove comes off and you see the iron hand, because "upon his own motion" the President, in any trade or industry, interstate, intrastate, intercounty, intercity—or any subdivision thereof—may prescribe a code which shall have the same effect as that which we were taught to believe was a permissive code by the voluntary cooperation of trade and industry.

Subdivision (f) is the penal provision and provides:

> "When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or effecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500

for each offense, and each day such violation continues shall be deemed a separate offense."

Again there is a reference to interstate and foreign commerce, and apparently the author of the Act did not dare to provide a penalty for violations of any code except a code which related to interstate or foreign commerce. Just as in the case of Subdivision (b), when it was sought to fix jurisdiction in the Federal Trade Commission, the author of the Act limited the violations to those effecting interstate and foreign commerce.

Section 7, in Subdivision (b), provides:

"The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of Section 3."

In subdivision (c) of Section 7, it is provided:

"Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions

of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage."

Thus, in Subdivision C of Section 7, interstate and foreign commerce disappear from the vision of the reader and from the pen of the author, and the President is empowered, on his own motion, to investigate the labor practices, policies, wages, hours of labor and conditions of employment in any trade or industry, or subdivision thereof, whether it be intrastate commerce or interstate commerce, or local commerce, and if he finds it advisable he is authorized to prescribe what is called a limited code of fair competition, fixing the hours of labor, the minimum rates of pay and the conditions of employment in the trade or industry investigated, as "he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3".

To put it briefly and bluntly, the Act purports to deal with all commerce, industry, labor and business, but it prescribes penalties and punishment only in transactions affecting interstate or foreign trade and commerce. It is a matter of common knowledge that every class and kind of business has been subjected to regimentation. All classes of business, local, intrastate and interstate, by the Act are swept up into the very hands of the President of the United

States, for that sort of control and regimentation as in his wisdom or the wisdom of his nominee seems advisable, and the only differentiation between interstate and foreign commerce and all other classes of business and commerce is with respect to penalties, licenses and Federal Trade Regulation which only apply to interstate and foreign commerce. The act, as an Act of the Congress, deals as fully and as drastically and completely with local and intrastate commerce, in so far as its regulation is concerned, as it does with interstate and foreign commerce, and therefore falls directly within the prohibition so well defined in the case of *Martin* v. *Hunter's Lessee,* 14 U. S. (1 Wheat.), 304, 326, in which the Supreme Court said:

> "The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

This language was quoted in *Newberry* v. *United States* 256 U. S. 232, 249.

An effort has been made to justify the far reaching and sweeping legislation which the Congress embodied in the Act by saying that, in effect, all business, even though local and intrastate, and transactions therein, affects interstate commerce and that, therefore, the Act is constitutional because, in effect, all business, even though local or intrastate, does affect interstate commerce and thereby confers jurisdiction upon Congress to deal with all classes of business.

The Constitution, Article 1, Section 8, provides:

> "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes."

Thus we find in the famous "Child Labor" case of

Hammer v. *Dagenhart*, 247 U. S. 251, 272, the law stated to be as follows:

> "The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. *'Pipeline'* cases, 243 U. S. 548, 560. The maintenance of the authority of a state over matters purely local is as essential to the preservation of our existence as is the conservation of the supremacy of the Federal power in all matters entrusted to the nation by the Federal Constitution. In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are served. *Lane County* v. *Oregon*, 7 Wall. 71, 76. The power of the states to regulate their purely internal affairs by such laws as seem wise is inherent and has never been surrendered to the general government. * * * This Court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge harmoniously with the other the duties entrusted to it by the Constitution."

Though the facts in the foregoing case clearly established a well recognized evil of child labor, the power of Congress to remedy such condition in the name of interstate commerce, was denied to it by this Court.

It is respectfully submitted that the decision of this Court in *Hammer* v. *Dagenhart* (*supra*), is the most insurmountable obstacle to sustaining the Act under the purported power of Congress to regulate interstate commerce.

Such unlimited grant of power exemplified in the Industrial Recovery Act was denied by this Court in the case of

Hooper v. *California*, 155 U. S. 648. In that case, the Court laid down the succinct rule with respect to the power of Congress over interstate commerce. It stated:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature."

Similarly, in *Kidd* v. *Pearson*, 128 U. S. 1, this Court held:

> "Manufacturing is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different * * *. If it be held that the term (commerce) includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining;—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago?"

Although this statement was uttered in a case involving state power, we assume that it is unnecessary to labor the point that the so-called "New Deal" conception of the com-

merce clause is a far cry from the above quoted doctrine endorsed by a unanimous Supreme Court.

The National Industrial Recovery Act and the Codes promulgated thereunder, are admittedly a novelty and regarded by all as an "economic experiment". That its scope is not limited to interstate commerce has been professed by its most ardent supporters, and it is a matter of common knowledge that the provisions of the Codes do not stop with interstate commerce or with those trades or industries that are interstate in character. There is even no pretense to such limitation.

Senator Robert F. Wagner, the proponent and protagonist of the bill, in expounding upon the same before the Senate Finance Committee, stated the following:

> "But where the entire economic structure is down and is in a depressed state, the only way we can lift it up and have our economic structure survive is by enabling business as a whole, to lift it up, and that is needed in order to bring about economic recovery. Then, I say, *let all business be regarded as affected by the public interest which justifies governmental intervention.* * * * *And it is equally true that many commercial and industrial practices which in normal times would have only intrastate significance are magnified to national importance during a period of severe strain, and burden interstate commerce.* To some it may appear that we are venturing far from the original purposes which guided the Fathers of our Constitution. In sober truth, we are acting under the compulsion of the economic situation." (Italics ours.)

At such time the following senatorial exchange occurred:

Senator Wagner:

> "The philosphy of this bill is to encourage volun-

tary action and initiative on the part of industry and I doubt whether or not these compulsory methods will be used at all except on very rare occasions; but if you are going to lift the standard, you have got to have some sanctions in order to enforce the code that may be adopted."

Senator Gore:

"* * * My point is why in a free country a free man ought to be required to take out a license to engage in legitimate industry and why somebody under our Constitutional system should be given the power to destroy the value of his property, which you do when you bring about a situation where he cannot operate. That seems to me approaching the point of taking property without due process of law."

Senator Clark:

"Senator, do you think that the mere declaration of emergency would make an act constitutional that otherwise would be unconstitutional? You said it could be done in an emergency?"

Senator Wagner:

"No; but I think the powers exercised under the Constitution may have a wider use for governmental activity than in normal times. I mean, if I may say again, we may now regard that all business is affected with the public interests in an emergency, where, perhaps if the emergency did not exist, courts might not justify our going as far as that."

Senator Gore:

"This act if passed will mean that the Constitutional rights of a citizen and the Constitutional power of a government will vary with the variation of economic conditions and the state of mind of those in authority?"

Senator Wagner:

"I think that has always been the philosophy of the law."

When recourse is had to the activities of the Federal Government, it will be found that in the course of the enforcement of the various Codes approved under the National Industrial Recovery Act, the Federal District Attorneys have hurdled all State lines and bars and by way of criminal indictment and equity injunctions, have sought the enforcement of purely local business following through the arguments of the promulgators of the Act and Codes.

We find in the following reported decisions, that without exception, attempts have been made to regulate strictly local business on the far fetched conception that all business in times of so-called emergency, affect interstate commerce. We respectfully cite but a few of the prosecutions and injunctive proceedings all of which have been decided against the Federal Government by the lower courts.

United States v. *Suburban Motor Service Corp.*, 7 Fed. (Supp.) 798;

United States v. *Lieto*, 6 Fed. (Supp.) 32;

United States v. *Mills*, 7 Fed. (Supp.) 547;

Hart Coal Co. v. *Sparks*, 7 Fed. (Supp.) 16;

Purvis v. *Bazemore*, 5 Fed. (Supp.) 230;

Irma Hat Co. v. *Local Retail Code Authority*, 7 Fed. (Supp.) 687;

United States v. *Eason Oil Co.*, 8 Fed. (Supp.) 365;

United States v. *Sutherland*, U. S. Dist. Ct. Western Dist. of Missouri Western Division in Equity No. 2552, Dec. 27, 1934 (not yet officially reported—see Prentice Hall Trade & Industry Service, p. 8552);

United States v. *Kinnebrew Motor Co.*, 8 Fed. (Supp.) 535.

In *United States* v. *Lieto*, 6 Fed. Supp. 32, the District Court dismissed the contention that under the guise of the power to regulate interstate commerce, all businesses may be regulated by Congress under the legislation found in the National Industrial Recovery Act. While not conclusive upon this Honorable Court, the language of the lower Court so successfully disrupts the arguments of the Federal Government in support of the alleged power, that we feel it should be quoted:

> "* * * Now the national government has a right to do anything it can, and it is the business of that government to do anything it can to relieve that emergency, provided that which it does is within its power to do. Local business; business confined exclusively to a state; business which does not impinge upon or affect, or disturb interstate commerce, is wholly beyond the fingers of the national government. Such business is amenable to the local government. The fundamental laws of the land preserve and recognize both sorts. The very charter of the national government proclaimed the continuity of the power of the people and of the power in the states. The power that rests and remains with the citizen and with the state is as sovereign and unamenable to attacks from the national government as is the power of the national government sovereign and immune from any act of the state. Each must retain this separateness, and, this distinctness, and, this independence in order to preserve the autonomy of the American system. The system is itself of infinite value. Experiments in the governmental field in other countries, as exhibited in history, drove the fathers to the thought, and keep us true to it, that a government such as is ours must have a dual system. That is a national and a state system. Our country is too large, sections are too remote, interests are too diversified, liberties are too numerous and

valuable, and, the activities of the people are too multiplied to permit a congestion of all power in the national seat."

And further:

"It has been thoughtfully suggested that the newspaper which we read in the morning is the physical product of far away jurisdictions. That the food which is eaten on the table of the citizen comes from many climes. That the clothes that give the body its respectability and health and which preserve it from the rigors of the climate and elements is not always local in conception. To grant the proposition that one who sells an apple in a stand on a street in the city of Dallas for a less amount than the price fixed by a code which relates to sale of fruit, because that apple may have been raised in Oregon or in New Mexico, or because the hand that delivers it to the purchaser and receives a nickel therefor, is the hand of a humble employee who gets less than a nationally fixed wage, it seems to me would be stretching the power of the National government beyond apology. What may be said, then, of a criminal law which punishes a Texan for selling that which came out of Texas earth and has never been elsewhere?"

The mental giant in the fineness of logic may trace a connection between a puff of the breath as an augmentor of the passing wind, or between the light of the burning coal and the primal rays of the sun, but, that sort of a fineness in scientific reasoning may not be carried into the practical execution of the criminal law for the purpose of showing a connection between someone who sells an apple or a suit of clothes or a newspaper or a gallon of gasoline so as to therefrom argue a direct effect upon interstate commerce."

In *Hart Coal Co.* v. *Sparks*, 7 Fed. Supp. 16, the Federal District Court expressed itself thusly:

> "The scheme of regulation of the strictly local affairs of the citizens of the country, attempted to be set up and enforced under the Recovery Act, has no place in our system of government, and it is futile for its defenders to attempt to justify it on constitutional grounds. No such justification can be found. It is the boldest kind of usurpation—dared by the authorities and tolerated by the public only because of the bewilderment of the people in the present emergency. Every person at all familiar with the Constitution and our scheme of government under it knows that no such power exists, and its mere academic assertion would be amusing, but its determined exercise is tragic. In the exercise of this claimed power, the National authorities have reached out and by Codes and other regulations are attempting to regulate every conceivable character of local business—the tailor in his shop, the merchant in his store, the blacksmith at his forge, the coal operator and the manufacturer. Apparently, none of the activities of man are acknowledged as beyond its reach. If the existence of such a power in the National government be admitted, it means the end of constitutional government in this country, under which individual effort and initiative have been fostered and encouraged, and the people generally have enjoyed a degree of liberty of person and security of property unknown to the rest of the world. I know of no higher duty of the National Courts, the judges of which are sworn to support and defend the Constitution of the United States, than to strike down such an unwarranted invasion of the reserved powers of the States and the rights of the people."

The Courts have zealously guarded the distinction be-

t ·en the State's police power and the right of Congress to legislate with respect to interstate commerce.

Hannibal R. R. v. *Fusen*, 95 U. S. 465;
In re Rahrer, 140 U. S. 545, 554.

Bearing in mind the essential distinctions between what a State may do and what a Federal Government may do, remembering that the foundations of this Government are predicated upon the fact that certain powers have been delegated to Congress and that others remain with the States, it is submitted respectfully that the judiciary should be equally as jealous of Congressional invasion of state rights through the medium of mere lip service to the formula that a particular Congressional Act concerns itself with interstate commerce.

Thus, mere introductory apologies to an Act attempting to bring it within the express powers granted to Congress, cannot save the same where the manifest right to legislate with respect to the particular subject matter, does not exist.

Congress has clothed the act in the well-known garb recognized as necessary for the proper protection of all similar congressional legislation having as its purpose the regulation of commerce between the States, but those entrusted with the duty of guarding the rights of those affected must strip the act of the fine feathers which adorn it and thus, while it stands naked before the bar of justice, pass upon its substance, rather than its form.

Whatever may be the express wording of the act with respect to interstate commerce, the intent and mechanics of the same is to put the Government into business. By legislative fiat, State lines have been wiped out so that the established principle of using the crossing of a State line as the guide for determining whether or not interstate business is affected, has been discarded completely.

"Free flow of commerce" in the past has meant that the stream of industry over State lines may be regulated by Congress and may not be dammed by State action. The National Industrial Recovery Act makes impossible any vertical obstructions in the stream of interstate commerce by widening its bed to the extent of flooding the country.

The act lays down as a legislative philosophy the principle that every business affects another, that intrastate business is so interrelated with interstate business with respect to the effect of one upon the other, as to make it impossible to distinguish between the two, and that by reason thereof Congress has the power to regulate all business.

It thus considers that the obstructions to the free flow of interstate commerce can only be removed by a general regulation of all business regardless of the character of the enterprise regulated, whether purely local or national in scope. It is submitted that the general effect of intrastate commerce upon interstate commerce may be so tenuous and incapable of fixation as to make it an unfit subject for legislation.

If the philosophy inherent in the National Industrial Recovery Act as here propounded is admitted, reference to precedent can be of little assistance, yet the same is not altogether to be disregarded. Thus, we find that commerce capable of regulation by Congress does not include the building of ships, the loaning of money, the dealing in bills of exchange, subscription of stock, the manufacture and erection of elevators in a building, the business of coal mining, rafting logs or the local sales of goods. The decisions of this Court have repeatedly held that the local sale of goods, the business of making or manufacturing goods is not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production subject to the Federal authority within the commerce clause of the Constitution.

Hammer v. *Dagenhart*, 247 U. S. 251;

United Mine Workers v. *American Coronado Coal Co.*, 259 U. S. 407;
Champlain Refining Co. v. *The Corporation Commission*, 286 U. S. 210;
Oliver Iron Mining Co. v. *Lord*, 262 U. S. 171;
Pipe Line Cases, 243 U. S. 548;
Board of Trade v. *Olsen*, 262 U. S. 1;
Hooper v. *California*, 155 U. S. 648.

To sustain the validity of the National Industrial Recovery Act necessitates the overthrow of all of the doctrines with respect to interstate commerce which have guided the conduct of the Government, the judiciary and of business since the inception of the Republic.

No better criterion for determining whether or not a specific act of Congress is within its power to regulate interstate commerce has been stated than is contained in *United States* v. *Ferger*, 260 U. S. 199, in which case the court says:

> "They cannot come within the regulatory power of Congress as such unless they are regarded by Congress from the evidence before it as directly interfering with interstate commerce so as to be an obstruction or burden thereon."

Close examination of the provisions of the National Industrial Recovery Act reveal not a single pronouncement that any particular trade practice, form of doing business or particular relationship is obstructing or burdening interstate commerce. The provisions of the statute are vague in the extreme. It is the declared policy of the act to "eliminate unfair competitive practices." Nowhere is there any statement in the act as to what is to be considered unfair. (It is submitted that within the doctrine of *United States* v. *Cohen Grocery*, 255 U. S. 81, the act may be held

unconstitutional as being a violation of due process of law upon the ground that no ascertainable standard of conduct is fixed.) No attempt has been made in the act to eliminate a particular obstruction to interstate commerce nor to aid a particular vehicle of interstate commerce.

N. I. R. A. concerns itself with the "entire sphere of mercantile activity."

In attempting to meet an economic distress in which the country finds itself, Congress has summarily placed all business under the aegis of the interstate commerce clause. That the legislative body of the United States has given lip service to the formula that it seeks only to regulate commerce should not blind the court to the realities of the situation that by the National Industrial Recovery Act the United States Government has taken over the management and control of every business of every nature and description, however local the same may be.

It is sincerely urged that the proponents and protagonists of the National Industrial Recovery Act will not and cannot for one moment urge that N. I. R. A. and the Codes promulgated pursuant thereto find their *raison d'etre* in the interstate commerce clause of the Constitution.

Citations by the proponents of the constitutionality of the National Industrial Recovery Act of the so-called various Landmark cases in the history of the due process clause from *Munn* v. *Illinois*, 94 U. S. 113; through *Nebbia* v. *New York*, 291 U. S. 502, is not in the least helpful. These cases are founded upon the admitted fundamental concept that the States of the Union may legislate within the police power. The concept we are faced with in the present emergency is whether Congress has an equal right. To state the proposition is to answer it. If Congress has an equal right to legislate with respect to police power, then the doctrine of State's rights of the separability of National and State legislation has been eradicated. This, it is submitted in the

light of precedent, finds no support in the past, and unless the Constitution is to be scrapped, is unthinkable in the future.

It is respectfully submitted that in the light of the authorities herein submitted, and with due respect to even a liberal interpretation of the Constitution, the powers claimed by the Congress to legislate in the fashion found in the National Industrial Recovery Act, are non-existent and that the legislation must fall.

The sponsors of the National Industrial Recovery Act and its supporters, seem to urge authority for the legislation in any one of three possible directions, in addition to the "Commerce Clause" heretofore commented on.

(a) The Preamble to the Constitution.

(b) The "general welfare" clause.

(c) The existence of emergency.

The Preamble can be summarily dismissed for this Court has explicitly held that it confers no power on Congress.

Jacobson v. *Mass.*, 197 U. S. 11.

This Court, in this now famous case, held:

> "• • • Although that preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power

> can be exerted to that end by the United States, unless, apart from the preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. 1 Story, Const., Sec. 462."

In 1 Story on Constitution, Section 462, this learned authority holds the rule to be as follows:

> "The preamble never can be resorted to, to enlarge the powers confided to the general government or any of its departments. It cannot confer any power *per se;* it can never amount, by implication, to an enlargement of any power expressly given."

Neither can the "general welfare" clause be considered as a constitutional support for the legislation attacked. The "general welfare" clause grants no power of the nature claimed for it, but is a mere specification of the purposes for which money may be appropriated. Such has been its uniform construction. It is limited for that distinct purpose and no more.

> Willoughby on Const. Law, 2nd Edition, 1921, page 61;
> 41 Federalist;
> *South Carolina* v. *United States,* 199 U. S. 437;
> *United States* v. *Boyer,* 85 Fed. 425 (Dist. Court, Mo.);
> *United States* v. *Realty Co.,* 163 U. S. 427.

The "welfare" clause has never been regarded as a substantive grant of power. "Any other view would be completely inconsistent with the doctrine that the Federal Government is one of enumerated powers" (Harvard Law Review, November 1933).

As a final basis for the Constitutional support of the

Act, the great public emergency is urged as a constitutional basis for the enactment of the legislation.

It is respectfully submitted that the public emergency declared in the Act as the basis for the Congressional action, is of no avail if the Constitution, *per se*, or by necessary implication, conferred no power to deal with it upon Congress.

By a long line of authoritative decisions, this Court has repeatedly declared that an emergency may not call into life a power which never was, but that emergency may afford a reason for the exercise of a granted living power already enjoyed.

Home Building & Loan Assn. v. *Blaisdell*, 290 U. S. 398;
Wilson v. *New*, 243 U. S. 332;
Block v. *Hirsh*, 256 U. S. 135;
Levy Leasing Co. v. *Siegel*, 258 U. S. 170;
Marcus Brown v. *Feldman*, 256 U. S. 170.

The Adamson Law, which the Court was considering in *Wilson* v. *New* (*supra*), was clearly an instance in which the sweeping powers of Congress over interstate carriers was awakened and exerted by Congress under an emergency; but in the Act here under discussion there is no awakening of sleeping powers, no exercise of a living but unused power under the provocation of troublous times. On the contrary, there is a bold, audacious, ruthless reaching out beyond constitutional limitations, across the State lines into the very daily life of every common calling and into the very heart of every individual and his individual business and trade, and an intrusion of government control and regulation, without even the semblance of a power, express or implied. It has been held and never departed from that emergencies do not permit those in power to suspend constitutional guarantees.

The first great case on this head is *Ex Parte Milligan* (1866), 71 U. S. (4 Wall.) 2, 120-121. In that case the Court said:

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism."

In *Sterling v. Constantin*, 287 U. S. 378, the Supreme Court of the United States was considering an attempt by the Governor of Texas to regulate the use of complainants' property in the production of oil by Executive Order and with the aid of the militia. The Court, in deciding the case, cited the *Milligan* case and added: The proposition submitted to the Court was in substance that the military may suspend all civil rights in time of war. The Court said in the unanimous opinion:

> "The statement of this proposition shows its im-

portance; for, if true, republican government is a failure, and there is an end of liberty regulated by law."

In *United States* v. *Cohen Grocery Co.* (1921), 255 U. S. 81, 88, the same doctrine was sustained under the Lever Food Control Act.

While an emergency may affect the extent or manner in which an existing power may be exercised, *it does not confer or create new or additional powers or justify disregard of constitutional rights and limits.*

"* * * An emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." *Wilson* v. *New*, 243 U. S. at 348.

In *Wilson* v. *New, supra,* the court well says on page 348:

"If acts, which, if done, would interrupt, if not destroy, interstate commerce, may be, by anticipation, legislatively prevented, by the same token, the power to regulate may be exercised to guard against cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite of the uninterrupted flow of interstate commerce."

It is thus to be seen that a specific act endangering movement in interstate commerce was legislated against. It cannot be claimed that anything tangible in the sense of specific cause and effect can be pointed to in N. I. R. A. as predicating interference with interstate commerce.

Those favoring the N. I. R. A. will undoubtedly raise the cry that if the same be held unconstitutional, the pro-

gress of the nation toward economic recovery will be inevitably delayed or destroyed. With that very thought, many of the leading economists and political theorists of the day take issue. Though the cure may be worse than the ill, in keeping with well-founded principles of constitutional interpretation, the judiciary will not inquire into whether or not the remedy sought to be invoked by a legislative body will accomplish its purposes if the power to invoke the remedy exists.

As was well said in *Nebbia* v. *New York*:

> "With the wisdom of the policy adopted, with the adequacy of practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal * * * though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

We need not concern ourselves with a discussion of whether the means may accomplish the end, since by the foregoing, power to accomplish the end by the means sought does not rest with Congress.

It is submitted that to sustain N. R. A. is to judicially legislate that Congress may enter the field of police power to the extent of directing local government and setting itself up against local and State autonomy and is to emasculate the Constitution in its entirety and to change our form of government.

Recognizing the contagious effect and harmful results of mob psychology, the founders of our republic and framers of the Constitution refused to enunciate any doctrine and the various States refused to subscribe to a doctrine that would abrogate the right of the individual States to take care of its own, except where the Union was threatened by a foreign foe. They therefore set up inalienable rights

which inhered to the people and to the States, which under no circumstances could be withdrawn from them, and which even the necessities of war could not eradicate (*Ex parte Milligan*, 4 Wall. 2).

It was in anticipation of a possible abortive attempt, on the part of what may be now referred to as the Continental Congress, to usurp the powers of the States, that the principle was enunciated that under no circumstances could the rights delegated to the States be in any way altered or impaired, except by the sanctions contained in the Constitution.

The sophistry of putting the Horseman of Despair and Depression on an equal legal footing with the Horseman of War cannot stand up under the scrutiny of the philosophy upon which this Government was founded. Despite four years of war, in which brother fought against brother, despite the fact that half of the nation was in the relationship of a conquered subject province of the other half, it nevertheless needed a constitutional amendment to blot out the stain of slavery, the cause of the war, and which the blood of the sons of the republic could not wash away. States' rights must be preserved.

Thus did our forefathers recognize the fundamental concept upon which the republic is predicated; that there are certain inalienable State rights which cannot be disregarded.

It was to meet popular hysteria and weakness that the Constitution was devised as a weapon for the use of the strong against the more numerous weak. No more noble or herbic duty devolves upon the judiciary of this country than to refuse to heed any panacea induced by public weakness which necessitates forgetting the Constitution which they have sworn to uphold and to obey.

As was said in *Adkins* v. *Children's Hospital*, 261 U. S., at 561:

"To sustain the individual freedom of action con-

templated by the Constitution is not to strike down the common good, but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraint of the liberties of its constituent members."

The words of the court in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, at 416, must be heeded:

> **"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."**

The stabilizing limitations of the Federal Constitution are the firmest pillars of true Republican government and economic distress or so-called "emergency" is no legal justification for the subversion of this form of government. A zealous judiciary should uphold the Constitution particularly in the face of popular excitement and exhortation.

The Federal and State Constitutions are not things merely to be extolled in academic halls or be the subject of juvenile orations, but are vibrant and designed to safeguard not only life and liberty, but also property rights in times of stress and suffering when despairing and desperate majorities seek, by forbidden methods, the subversion of fundamental principles of government.

B. The delegation of legislative power to the President by Congress, renders the National Industrial Recovery Act unconstitutional.

The Constitution provides in Article 1, Section. 1, as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives."

By Article 1, Section 8 of the Constitution, Congress was granted the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. It is further authorized to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

The general rule that the powers of government are divided among the three departments of government, and that the powers must be separately exercised by the respective departments which are invested with the powers by the Constitution, is elementary as stated in *Myers* v. *United States*, 270 U. S. 52, as follows:

> "• • • the Constitution was so framed as to vest in Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish, the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended and the Constitution should be expounded to blend them no more than is affirmatively required."

The rule appears in *Meriwether* v. *Garrett*, 102 U. S. 515, where the court said:

> "• • • all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration."

It is an ancient maxim, well established in the law, that once a power has been delegated it cannot be redelegated.

"Delegata protestas non potest delegari." It is fundamental that the power to legislate must remain wherever a sovereign people of a State have placed the legislative authority in the formulation of a Constitution for their guide. This has been so well founded as to become axiomatic and is a philosophy particularly applicable to the form of government of the United States.

In *Springer* v. *Philippine Islands*, 277 U. S. 189, the proposition is succinctly stated:

> "It may be stated then as a general rule inherent in the American Constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judiciary power; the judiciary cannot exercise either executive or legislative power."

Panama Refining Co. et al. v. *Ryan* (135);
Amazon Petroleum Corp. v. *Ryan* (260); (United States Supreme Court, Nos. 135 and 260, January 7, 1935);
Field v. *Clark*, 143 U. S. 649;
Interstate Commerce Commission v. *Goodrich*, 224 U. S. 194;
United States v. *Grimaud*, 220 U. S. 506;
Buttfield v. *Stranahan*, 192 U. S. 470;
Wayman v. *Southard*, 10 Wheat. 1;
Oceanic Steam Nav. Co. v. *Stranahan*, 214 U. S. 320;
Passavant v. *United States*, 148 U. S. 214;
Union Bridge v. *United States*, 204 U. S. 364;
J. W. Hampton, Jr. v. *United States*, 276 U. S. 394;
Lynch v. *Tilden Co.*, 265 U. S. 315;

Maryland Casualty Co. v. *United States*, 251 U. S. 342;

Utah Power & Light v. *United States*, 243 U. S. 389;

United States v. *Shreveport Grain & El. Co.*, 287 U. S. 77.

Throughout the foregoing cases the distinction is drawn in the delegation of a discretion as to what the law shall be and the delegation of discretion in the administration of what Congress has declared the law shall be. Congress may authorize the latter, but it cannot do the former. Where the delegation of Administrative power ends and that of legislative power begins is a proposition which can only be decided as each case presents itself. As was well said by Mr. Justice Brandeis in his dissent in *Springer* v. *Philippine Islands*, 277 U. S. 189, at 210:

> "The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."

In *Field* v. *Clark*, 143 U. S. 649, Congress, for the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, tea, coffee and hides, passed an act to the effect that the Act of 1890 permitting their free importation should be suspended as to any country which the President of the United States deemed imposed duties on our agricultural products reciprocally unequal. The constitutionality of the act was challenged as a delegation of legislative powers and the court held, at page 693:

> **"That Congress cannot delegate legislative power to the President, is a principle universally recognized as vital to the integrity and maintenance of a system of government ordained by**

the Constitution. The act of October 1st, 1890, in the particular under consideration, is not inconsistent with that principle. It does not in any real sense invest the President with the power of legislation. * * * Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * **He had no discretion in the premises except in respect to the duration of the suspension so ordered, but that related only to the enforcement of the policy established by Congress.** * * * What the President was required to do was simply in execution of an Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect.

The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In *United States* v. *Grimaud*, 220 U. S. 506, Congress passed a general act establishing forest reservations and subjecting their use for grazing to regulations to be prescribed by the Secretary of Agriculture in his discretion, Congress providing the punishment for violation. The court said:

"It must be admitted that is difficult to define the line which separates legislative power to make laws from administrative authority to make regulations."

At page 522:

"The Secretary of Agriculture could not make rules and regulations for any and every purpose.

Williamson v. *U. S.*, 207 U. S. 462. As to those here involved they all relate to matters **clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. Congress legislated on the subject as far as was reasonably practicable** and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."

In *United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77, the court says:

> "That the legislative power of Congress cannot be delegated is, of course, clear. But Congress may declare its will and after fixing a *primary standard*, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations. The effect of the provision assailed is to define an offense, but with directions to those charged with the administration of the act to make *supplementary* rules and regulations allowing reasonable variations, tolerances and exemptions which, because of their variety and need of detailed statement, it was impracticable for Congress to prescribe."

Examination of the foregoing cases with respect to distinguishing between the delegation of legislative and administrative powers reveals the following guides: there must be no discretion in what the law shall be; the extent of law must have been clearly indicated in so far as practicable by Congress, and the most that the delegated authority may do is to supplement the rules laid down by Congress. While the difficulty in labelling twilight either day or night is judicially recognized, the distinction between day and night is such as to admit of no doubt. In all of the foregoing cases Congress enunciated and specifically defined certain laws, in the execution of which varying degrees of discretion were necessary, but throughout all of the cases one funda-

mental fact is common to all. The scope and field embraced by the law was specifically defined by Congress. The incidental manner of its execution, the determination of facts as to what will constitute violation, was the most that was delegated.

Turning then to N. I. R. A. we find the following: that in Section 1 thereof Congress has declared it to be the legislative policy, by reason of a national emergency, to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish unemployment and disorganization of industry by inducing united action of labor and management, promoting the organization of industry for the purpose of co-operative action among trade groups, to eliminate unfair competitive trade practices, promote the fullest possible utilization of the present productive capacity of industries, avoid undue restriction of production, increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor and otherwise to rehabilitate industry and conserve natural resources. Section 10 of the Act authorizes the President to prescribe such rules and regulations as may be necessary to carry out the purposes of this title. Without examining what is contained in the Act between Sections 1 and 10, in keeping with the rules laid down in the foregoing cases, and with the memory of the form of most statutes, a presumption would be reasonable which concluded that Sections 2 to 9, inclusive, contained Congressional *legislation,* Congressional *definition,* touching on unfair competitive practices, promotion of co-operative action among trade groups, the restriction of production, improvement of the standards of labor, and the other purposes and policies laid down in Section 1.

What do we actually find? Section 2 grants to the President the power to establish agencies to carry out the policies set forth in Section 1, including the appointment without

regard to the provisions of the civil service laws of such officers and employees as he may find necessary.

Section 3 contains the delegation to the President of the power to make laws rather than to fill in such details as may be necessary in their execution. Section 3 authorizes the President of the United States to approve a Code of Fair Competition where in his **sole discretion** he finds that they contain no inequitable restrictions on admission to membership therein and are truly representative of the trade codified, and do not permit monopolies or monopolistic practices. **In the sole discretion of the President of the United States as a prerequisite to his approval he may impose conditions upon the promulgation of codes as he deems in furtherance of the public interest** and may provide such exceptions to and exemptions from the provisions of a code as in his sole discretion he deems necessary. **Upon approval by the President of the United States alone, such code becomes the law for the guidance of the members of an industry and must be enforced by all the authority which vests in the United States Government.** Upon his own motion, where no code has theretofore been approved, the President of the United States, after such public notice and hearing as he in his sole discretion shall specify, may promulgate a code for a particular industry.

By Section 4 of the Act, when the President of the United States, *in his sole discretion,* finds that activities contrary to the policy of this title are being practiced in any trade or industry, he may, on such notice as he deems necessary, issue an edict that after a certain date no one may engage in a business affecting interstate commerce unless he first shall have obtained a license from the President of the United States.

There is not contained in the foregoing act, with the possible exception of such provisions as may refer to the

petroleum industry, a single specific, well-defined legislative enactment. It is submitted in all sincerity that Congress might just as well have said:

> "The country is faced with an emergency; we do not know how to meet it; Mr. President make your own laws."

In keeping with the powers vested in him by this act the President of the United States has enacted laws covering every field of endeavor imaginable. Whether or not a State or Federal government may pass laws with respect to hours of labor, wages and conditions of employment the same have been the subject of judicial dispute since the founding of the Constitution. The right to so *legislate* has at times been denied, and at times affirmed, depending upon the facts of each case.

Sweeping aside all these fundamental concepts, the President of the United States has been given the power and authority to fix hours, wages and conditions of employment in his sole discretion and as he sees fit. **This is no "filling in of details." This is an establishment of laws.** The right of Congress to legislate with respect to child labor has been denied and at the present time State conventions and State legislatures throughout the country are acting upon a constitutional amendment with respect to child labor. Yet the President of the United States, within the authority conferred upon him by this act, has outlawed child labor. Is this "filling in details"?

The Supreme Court of the United States has forbidden Congress the right to legislate with respect to the business of the butcher, the baker and the grocer. Congress cannot evade this restraint upon its power by delegating its exercise to the President of the United States. Assuming that Congress had the right to legislate into existence the laws which are incorporated in the various codes which have been

promulgated, that right could not be transferred to the President of the United States.

Relying upon the foregoing proposition of law, we find several lower court decisions construing the National Industrial Recovery Act as an unconstitutional delegation by Congress of its legislative functions to the President.

United States v. *Suburban Motor Service Co.*, 7 Fed. (Supp.) 798;
Hart Coal Co. v. *Sparks*, 7 Fed. (Supp.) 16;
United States v. *Eason Oil Co.*, 8 Fed. (Supp.) 365;
Darweger v. *Staats* (N. Y. Supreme Court), 152 Misc. 522.

In *U. S. of America* v. *Suburban Motor Service Corp. et al* (*supra*), the Court said:

> "Did Congress, in enacting the National Industrial Recovery Act, delegate its legislative power in violation of the constitution of the United States?
>
> "The Supreme Court of the United States has said 'that Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution' (*Field* v. *Clark*, 149 U. S. 649, 692), but that court has been liberal in the application of the rule. (See *Norwegian Nitrogen Co.* v. *U. S.*, 288 U. S. 294, 305.) The question in each case seems to be whether the legislative branch of the government has, with sufficient definiteness, announced the legislative policy. If the Congress has, in the National Industrial Recovery Act, announced a legislative policy, it is in the following language, found in Title I, Section 1:
>
> 'It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to

diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of co-operative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.'

"It seems to the court that Congress in this act has been so indefinite in its pronouncement of the legislative policy that the principle of constitutional law which we are considering has ceased to have any effect in National affairs, if the act is valid. If the Congress may constitutionally delegate power as it has delegated it in the National Industrial Recovery Act, it is difficult to see why the Congress may not, in an act, declare that its policy is to provide for the general welfare of all the people and that, accordingly, the President may promulgate such rules and regulations, having the effect of law, as will in his discretion best provide for the general welfare of all the people, and, *when that happens constitutionally, constitutional government, as we have known it, will cease to exist.*" (Italics ours.)

It is respectfully submitted, that the legislative purposes, as expressed in the Act, have been declared in the most general terms, and that either the President under the Act or the persons engaged in the industry, have been given practically unrestrained, uncontrolled and unreviewable

discretionary power to prescribe rules, regulations and penal enactments for industry.

The delegation of such unqualified powers to an executive and further to the people, is in effect, a delegation of the power both to announce a legislative policy rather than to enforce a policy already announced, and to enact exclusive of legislative power, or beyond the scope of legislative policy, enactments of law.

> "Certainly in no previous statute has there been such a broad grant of power with so indefinite a guide given to a Congressional enforcement agency." (Harvard Law Review—November 1933.)

An analysis of the Act and the Code of Fair Competition involved in the case at bar, reveals: Startling delegation of legislative power by Congress to the President, and more startling, the re-delegation of such legislative power by the executive to the persons engaged in an industry, the people.

In short, the President is given such wide, unlimited and uncontrolled power that Congress has abdicated practically all of its lawmaking functions to the President, or to such subordinates to whom he may delegate such powers, and thus in one swoop the President is made czar or dictator of the country and of all industry and business within the nation. The codes have no value unless approved by the President, but when approved it is contemplated that they shall have the force "of law, not only in respect to those who have consented and agreed to be bound thereby, but also in respect to those who have not consented" thereto. The President is also given the power to prescribe compulsory codes in any trade or industry or subdivision upon his own motion or upon the mere filing of a complaint "that abuses inimical to the public interest and contrary to the policy herein declared are prevalent" therein.

Likewise, the President may at any time change any code. In short, the Act attempts to give the President absolute, arbitrary and uncontrolled legislative power to prescribe the terms and conditions upon which persons engaged in every trade and industry may conduct their business. The dictate of the President is final, and any violation of a code approved or prescribed by him, whether the violator has agreed to be bound thereby or not, is made a misdemeanor punishable by a fine of $500. per day for each violation.

It is clear that the statute makes the wholesale delegation of legislative power to the President if the delegated power to approve, or to prescribe and approve, codes of fair competition includes more than power to prescribe standards of fair competition within the field of "fair competition", "unfair competition", "unfair methods of competition", and "unfair competitive practices" as such field has been defined by prior judicial decisions and the ordinary and established meaning of those terms. Otherwise, it would include power to prescribe any regulations or laws which Congress itself could prescribe in order to accomplish the general objects and purposes of the statute as set forth in Section 1 of the statute, subject only to the limitation in Section 3 with relation to small enterprises and monopolies and monopolistic practices, and the positive requirements concerning labor in Section 3 (e) and the limitations in Section 5 relating to manual labor and farm products.

Excepting these limitations and requirements, no standard is defined and no principle declared controlling the administration of the Act. The Act might just as well have authorized the formulation and approval of codes for the welfare of industry and labor, or for the public welfare, and with the requirements and limitations referred to, would have been no less certain or definite than the Act in its present language.

Manifestly, this leaves the field within which authority is to be exercised largely, if not principally, without a statutory standard or principle of control. To illustrate the importance of this defect, reference may be made to one of the many perplexing problems that have confronted the administrators of the codes, *i. e.*, price fixing. The legislative policy with relation to price fixing is one of the most important subjects to be considered when codes are contemplated. Is price fixing to be permitted? If so, is it to be confined to a requirement that articles shall not be sold below cost? If that be the case, how are costs to be determined? Are they to be measured by productive and operative costs of economical units, or are they to be established at a figure sufficiently high to permit of the operation of units less happily situated? If prices are to be fixed above cost, what amount of profit shall be permitted?

These questions are but one phase of the problems that arise in the administering of the codes, and yet they involve legislative policies of paramount importance, certainly equal to, if not exceeding in vital consequence the subjects with reference to which the express limitations and requirements are prescribed in the Act.

There is not a word, however, in the Act that furnishes any standard or principle to guide or control the executive in determining these policies.

One of the major and most momentous objects of legislative action delegated to the President under this Act is that of determining what portion of income shall be allocated to labor and what portion shall be allocated to capital. Under the terms of the Act the power is absolutely invested in the President to make such orders in connection with the adoption of codes, whether voluntary or compulsory, as will determine this allocation.

This is one of the most important problems confronting the nation today. Several million American citizens receive income from invested capital. They may be in a

minority, but it may well be doubted whether they, together with those whom they employ in personal service and those who receive employment directly and indirectly as a result of their personal expenditures, do not constitute a majority of the people in receipt of income in the United States.

Is the economic welfare of the nation to be served by diminishing the purchasing power of these classes and increasing the purchasing power of those who labor for corporate enterprises? What balance is to be struck between those who live on the income of capital, either directly or indirectly, and those whose income is entirely dependent upon labor? This is without a doubt the most perplexing and difficult problem before the American people at this time.

Under this Act, authority is delegated to the President to determine that important and far-reaching problem. If the problem is to be dealt with by legislation, certainly it is one of the most important and vital subjects for legislative action that the nation has ever confronted. If Congress can delegate to the President the unlimited and uncontrolled discretion to determine that problem, as it has attempted to do, there is no subject of legislation and no form of legislative action that cannot be delegated. If this type of legislation can be sustained, then the way has been prepared for Congress to avoid all of its legislative responsibilities by enacting laws giving the President a general power of attorney to solve any legislative problem.

The argument of the appellant is tersely expounded in the decision of the New York Supreme Court (*Darweger* v. *Chas. B. Staats*, 153 Misc. 522):

> "The legislative power of the Congress has been abdicated more fully than in any previous enactments. Penal responsibility has been imposed for violation of the directions and regulations of ad-

ministrative authority to an extent never before imposed. If such abdication of legislative power is within the authority of the Congress, then a coordinate branch of the Federal Government created by the constitution may voluntarily destroy itself and disrupt the American system of government. If such grant was merely to create administrative rules and regulations to effect and carry out the provisions and declared purposes of the enactments, many authorities sustain such provisions. *If, however, a grant not merely to create administrative rules and regulations, but to enact and adopt legislation carrying criminal penalties, is constitutional, it must necessarily follow the power may logically be carried to the adoption of an act by the Congress to the effect that the President be empowered to adopt such rules and regulations as he may deem in the interest of the general welfare.* The destruction will then be complete. Representative government will have ceased to exist. Benevolent despotism will be substituted in its place." (Italics ours.)

It will no doubt be contended before this Court that the execution of the policy enumerated by Congress in Title 1 of Industrial Recovery Act is purely administrative, and the mere "filling in of details". With that contention, Constitutional authorities and the decided cases, disagree. Is the enactment of penal statutes, with drastic penalties for their violation a mere "filling in of details"? Is the regulation, through all the ramifications of industry, from the insignificant bootblack to the powerful industrial magnate, a mere "filling in of details"? The question begets the answer. We respectfully submit that the argument urged by the proponents of the Act, that the Executive merely "fills in details" is a cloak for the exercise of legislative functions.

It will undoubtedly be further urged on this Court

that the power delegated by the National Industrial Recovery Act to the Executive, is merely a power to determine the facts upon which the statute is to become operative or inoperative, or that the power delegated is merely that of finding facts and prescribing details for the administration of regulations under general standards and policies fixed by Congress.

These arguments, in the light of the authorities, are fallible, for in none of the decided cases was there ever a wholesale delegation of legislative power as is apparent from a reading of the present Act.

In all the cases cited by this Court in support of its decision in the case of *Amazon Petroleum Corp.* v. *Ryan* (*supra*), where Congressional delegation was involved, the holdings were without contradiction that Congress, in such particular incidents, had declared *within intelligible bounds and limitations* the functions of the Administrator. In all the cases, Congress had fixed a "primary standard", and granted the administrative power to administrative officers to fill in the details *within defined limits.*

United States v. *Grimaud,* 220 U. S. 506;
Hampton v. *United States,* 276 U. S. 394;
Field v. *Clark,* 143 U. S. 649;
The Brig Aurora, 7 Cranch. 383;
Union Bridge Co. v. *United States,* 204 U. S. 364;
Monongahela Bridge Co. v. *United States,* 216 U. S. 177;
United States v. *Chemical Foundation,* 272 U. S. 1.

In every case wherein the question was raised, this Court "has recognized that there are limits of delegation which there is no constitutional authority to transcend" (*Amazon Petroleum Corp.* v. *Ryan, supra*).

If the Act were held valid, "it would be idle to pretend that anything would be left of limitations upon the power of Congress to delegate its lawmaking functions" (*Amazon Petroleum Corp.* v. *Ryan, supra*):

> "The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law making function, the Congress would at will, *and as to such subjects as it chooses,* transfer that function to the President, or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government" (*Amazon Petroleum Corp* v. *Ryan, supra*). (Italics ours.)

The National Industrial Recovery Act evidences an unmistakable and indefensible delegation of legislative functions by Congress to the President without any intelligible standard or principle, without any bounds or limitations, and as such, must fall prey to the ax of unconstitutionality.

In the light of the foregoing considerations, we respectfully submit that the National Industrial Recovery Act and the Code of Fair Competition for the Motor Vehicle Retailing Trade approved pursuant thereto, must fall, for no warrant of authority exists in Congress to regulate the subject matter embraced therein, and in any event, the approval of the Code, by the President is a nullity, for with all due consideration to even a liberal construction of the Constitution, he has usurped a legislative function unconstitutionally delegated unto him by Congress.

POINT II.

The approval of the code of fair competition for the motor vehicle retailing trade by the President, more particularly Article IV, subdivisions A and B thereof, was beyond the scope of the provisions of the National Industrial Recovery Act.

The National Industrial Recovery Act provides, in Section 3 (a) that the President may approve, and in Section 3 (d) that the President may prescribe and approve, a *"Code of Fair Competition"* for a trade or industry or subdivision thereof. Section 3 (b) provides that: "After the President shall have approved any such code, the provisions of such code shall be the *standards of fair competition* for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an *unfair method of competition* in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended." Section 3 (c) vests the several district courts "with jurisdiction to prevent and restrain violations of any *code of fair* competition approved under this title", and vests the duty of instituting proceedings in equity to prevent and restrain such violations in the several United States District Courts under the direction of the Attorney General. Section 3 (f) provides that when a *code of fair competition* has been approved or prescribed by the President "any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor" and punishable by a fine of $500 for each day the violation continues.

It is the contention of the appellant herein that the

provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, Subdivision A (with the exception of paragraphs "5" and "6" thereof), and Subdivision B (with the exception of paragraph "8" thereof), are not authorized by the National Industrial Recovery Act, as properly construed, and that the President exceeded his proper functions in approving the same.

There is no definition of the term "fair competition" as used in the statute. The statute provides that any code approved or prescribed under it (1) shall not be designed to promote monopolies or (2) to eliminate or oppress small enterprises, and (3) will not operate to discriminate against them, and (4) shall not permit monopolies or *monopolistic practices*, and (5) shall tend to effectuate the policy of the statute, which is declared in most general terms.

Since Congress did not include a definition of the term "fair competition" in the statute, it must be assumed that it used the term in its legal significance by reason of its previous use in trade and in law. If Congress had intended to provide codes of broader scope, it would have used terms to cover the subject properly. Without much waste of words, it could have set forth the scope of the term "fair competition" if it was intended to have more than its ordinary and well established meaning as set forth in previous statutes and decisions.

In construing the statute as a whole the terms "fair competition" and "unfair method of competition" should be given their ordinary meaning in the light of the common law and the decisions under the Federal Trade Commission Act which is referred to in the statute. *Sears Roebuck & Co.* v. *Federal Trade Commission* (C. C. A.), 285 Fed. 307; *Federal Trade Commission* v. *Gratz*, 253 U. S. 421; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 453; *Federal Trade Commission* v. *Sinclair Refining*

Co., 261 U. S. 463; *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304.

It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decisions, is presumed to be used in that sense by the legislative body.

Kepner v. *United States*, 195 U. S. 100, 124, 49 L. Ed. 114, 122;
The Abbotsford v. *Johnson*, 98 U. S. 440, 441, 444, 25 L. Ed. 168, 169, 170.

Also, unless the contrary appears, statutory words are presumed to be used in their ordinary and usual sense, and with the meaning commonly attributable to them.

De Ganay v. *Lederer*, 250 U. S. 376, 381, 63 L. Ed. 1042, 1044;
Miller v. *Robertson*, 266 U. S. 243, 250, 69 L. Ed. 265, 272.

The ordinary meaning and the well-settled legal meaning of the term "fair competition" are the same, so either rule of construction may be applied.

In its use of terms, the statute resembles the Federal Trade Commission Act, which provides that "unfair methods of competition" in interstate commerce are declared unlawful. The Federal Trade Commission is empowered and directed to prevent the use of "unfair methods of competition" in interstate commerce.

The National Industrial Recovery Act, Section 3 (b) provides that violations of the "standards of fair competition" fixed by the "codes of fair competition" shall be deemed an "unfair method of competion" within the meaning of the Federal Trade Commission Act. It is clear that the two statutes refer to the same things.

The term "unfair method of competition" has uniformly

been construed to include only practices opposed to good morals because characterized by deception, bad faith, fraud or as against public policy because of their dangerous tendencies unduly to hinder competition or create monopoly.

The term "unfair method of competition" has been held by this court to have a legal significance, just as the terms "undue influence", "reasonable rates", etc., have legal significance. The term is referred to in *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427, 64 L. Ed. 993, 996, as follows:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practised by honorable opponents in trade."

See also:

Federal Trade Commission v. *Raymond Bros. Clark Co.,* 263 U. S. 565, 572, 68 L. Ed. 448, 455;

Federal Trade Commission v. *Beech-Nut Co.,* 257 U. S. 441, 453, 66 L. Ed. 307, 313.

In *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 648, 75 L. Ed. 1324, 1329, the court referred to the term "unfair method of competition" as used in the statute, as follows:

> "The bill which was the foundation of the act,

as it first passed the Senate, declared 'unfair competition' to be unlawful. Debate apparently convinced the sponsors of the legislation that these words, which had a *well-settled meaning at common law, were too narrow.* When the bill came from conference between the two Houses, these words had been eliminated and the words 'unfair methods of competition' substituted. Undoubtedly, the substituted phrase has a broader meaning but how much broader has not been determined. It belongs to that class of phrases which does not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called 'the gradual process of judicial inclusion and exclusion.' *Davidson* v. *New Orleans,* 96 U. S. 97, 104, 24 L. Ed. 616, 619. The question is one for the final determination of the courts and not of the commission." (Italics the writer's.)

In *Curtis Pub. Co.* v. *Federal Trade Commission,* 270 Fed. 881, 908 (C. C. A., 3d), affirmed with an opinion in 260 U. S. 568, 67 L. Ed. 408, the Publishing Company's contract with its local agents provided that they would not sell at wholesale the magazines of any other publisher without consent. In holding that such a contract was not an unfair method of competition, the Circuit Court of Appeals said of the Federal Trade Commission Act:

"* * * What is unfair competition in business? Now, while Congress has enacted, as we have seen, 'that unfair methods of competition in commerce are declared unlawful,' it has not defined unfair competition, or specified what shall constitute unfair competition. From this absence of definition, it is reasonable to infer that it was in the mind of Congress that, as unfair competition had long been a *subject of judicial scrutiny, determination,* and was involved in remedial suits at law for damages and of injunctive suits in equity, to prevent continuance,

the definition and ascertainment of what constituted unfair competition was a legal question which the law could determine. Indeed, in nature of things, it was impossible to describe or define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained, whether such facts constitute unfair competition in business, for the test of fairness, as of fraud, is the application by the law of moral standards to the actions of men."

* * * * * * * *

"* * * Manifestly, Congress did not mean to confer upon the Trade Commission the power to grant injunctions in cases of business competition, where courts would not be justified in granting injunctions." (Italics the writer's.)

In *Kinney-Rome Co.* v. *Federal Trade Commission*, 275 Fed. 665, 666, 668 (C. C. A., 7th), the court was reviewing an order of the Commission regarding a practice of giving premiums to salesmen of retailers. The court said:

"While the exact words 'unfair methods of competition' have not been frequently, if at all, used in the decisions, yet 'unfair competition' and 'unfair trade' have been repeatedly the subject of consideration and discussion by federal and state courts, and several times in this circuit. (There follows a review of cases.)

"We conclude, from the discussion of the term 'unfair competition' by the courts, and we are of opinion, that there must be some *fraud* in trade that injures a competitor, or *lessens* competition, before it can be said that there has been used an 'unfair method of competition.'"

In *Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463, 475, 67 L. Ed. 746, 754, the court reviewed a judgment of the Circuit Court of Appeals reversing an

order of the Federal Trade Commission against a refiner furnishing pumps to gasoline retailers. The court held the practice was not an unfair method of competition, saying:

> "The powers of the commission are limited by the statutes. *It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called 'competition'.* The great purpose of both statutes was to advance the public interest by *securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.*" (Italics the writer's.)

This court has followed these decisions in many cases which have come before it. In the recent cases of *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, and *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, the same general principles are set forth as in the preceding decisions of this court and applied to new instances of "unfair competition". In the first case goods were mislabeled so as to masquerade for something other than that which they really were, so as to deceive the public, and injure competitors not willing to do business on such an immoral or dishonest basis. In the second the unfair trade practices involved and promoted gambling by exploitation of consumers, principally children.

The following extract from Hearings before Senate Committee on Finances, on the National Industrial Recovery Act, May 22-June 1st, 1933, page 285, is instructive:

> "Mr. Emery. What can be put into that code, Senator, is highly indefinite.

Senator Reed. It may include such things as the selling price, may it not?

Mr. Emery. *I am very doubtful of that, because it says the President may include the codes, or code of fair competition. I do not know what he could put in there with the expectation of approving price control or control of production, because the Supreme Court in passing upon a case before the Federal Trade Commission said that that involves acts which are against good morals or involves fraud or deceit or tends toward monopoly, or acts which are oppressive or restrain trade.*

Senator Reed. It is our duty to protect the public just as much as it is to encourage industrial recovery.

Mr. Emery. Yes, sir.

Senator Reed. It seems to me that clearly under the law, as it stands today, for competitors to get together and make a pool fixing selling prices and eliminate competition is a crime under our present law.

Mr. Emery. It certainly is." (Italics the writer's.)

The term "unfair competition" was used by the courts in referring to trade offenses long before the term was ever used in a statute. Thus, in *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140, 49 L. Ed. 972, 986, in a suit to enjoin the use by another of a trade name, the court said:

"* * * the essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another; and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In *Goodyear's etc. Co.* v. *Goodyear Rubber Co.,* 128

U. S. 598, 604, 32 L. Ed. 535, 537, in a similar suit to restrain the using of a similar name, the court said:

> "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff."

The remedy of injunction, as applied to matters of "unfair competition", is discussed at length in Pomeroy's Equity Jurisprudence, 4th Ed., Sections 2005-2011. The basis for the remedy against unfair competition is that the guilty person is taking the business away from competitors by wrongful and unfair methods of doing business, involving oppression, fraud, or immorality of some kind. The most common basis for the remedy is a use of names or labels similar to those used by a competitor for the purpose of taking advantage of the competitor's good will or advertising.

There have been no cases which our search has disclosed where it has ever been even suggested that fair competition requires or contemplates the fixing of prices, the control of prices, or any of the provisions of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade. As a matter of fact, such activities as therein expressed, are ordinarily not opposed to good morals or characterized by deception, bad faith, fraud or oppression.

The purchase of a trade-in automobile or the sale of a new automobile is an innocent, lawful, local business. To place limitations upon such a business in the respects set forth in Article IV of the Code fetters free and fair competition as commonly and judicially understood and construed and practiced by honorable opponents in trade. The

provisions of Article IV attacked, operate by mere fiat to characterize the fair and honest activity of the local automobile merchant as unfair and dishonest. More than this, it is a perversion of the term "unfair competition", and is unfair and unjust to honest endeavor and to the merchant who has established a legitimate business and an established market for his automobiles. The provisions deprive the local automobile dealer of the right to freely compete and engage in his established market, and grants unto the honest, efficient merchant's competitors of less efficiency, such gainful advantage. It reduces the efficient and the inefficient to a common level by arbitrary and capricious means not related to fair competition and destroys the results thereof. (*Federal Trade Commission* v. *Sinclair Refining Co.*, 261 U. S. 463.)

When we set up legal restrictions such as are contained in Article IV of the Code, we remove the economic penalties of direct loss for engaging in ignorant and stupid price competition. We place a premium upon merchandising stupidity and guard with a halo, the inefficient retailer from the normal and incidental hazards of competition. There is no quicker road to business failure than to ignore the ordinary play competition affords and seek to burden the consumer with artificial restraint upon his purchasing power.

We would be perversely blind not to recognize that violation of these provisions (Article IV) has been widespread and that no effective machinery has been or could be possibly set up by the Government or anybody to detect and punish the innumerable violators of the provisions of this Code. It is impossible without an enormous and costly organization to police thousands upon thousands of automobile retailers throughout the United States. This is admitted even by the most ardent of enforcement agencies.

Witness the effect of the price fixing provisions of the former Code of Fair Competition for the Cleaning and

Dyeing trade upon that industry. It was so widely and flagrantly violated, that the President, for fear of complete destruction of the industry, rescinded the price fixing provisions of the latter Code and left remaining therein the salient provisions of the Industrial Recovery Act, to wit, maximum hours and minimum wages.

When a little tailor in the State of New Jersey was thrust into jail for pressing a pair of trousers at less than the established Code price, the hue and cry that ensued throughout the Nation, was deafening. He was immediately released from the penalties of such a nefarious crime.

The provisions of Article IV of the Motor Vehicle Retailing Code can no more be enforced than was Prohibition. Nor can trade policing be substituted for impartial but impossible government enforcement. Merchants should not be put to spy upon each other for such system breeds ill will, malcontent, animosity and favoritism. Local Code authorities cannot, by the nature of their composition, be impartial, or be permitted to determine who should or should not be prosecuted for violation.

The Record in the case at bar, presents a distasteful picture of oppression, hypocrisy, evasion, and above all, that contempt for law which inevitably follows widespread, impossible law enforcement. When so-called Code authorities resort to the use of dictaphones for the purpose of obtaining evidence against an alleged violator of the provisions of Article IV of its Code, we submit that it is indeed stooping to the lowest phase of reprehensible so-called enforcement.

If these price fixing provisions and trade regulations could or should ever be enforced, we would have to build many more penal institutions to house the Code violators.

Agreement with the contention urged in this point is found in several decisions of lower Courts which were called upon in the cases cited, to pass upon the validity of price fixing powers or price control by the Congress.

See:

United States v. *Robt. Sutherland* (District Court, Western Dist. of Missouri, Western Division, in Equity No. 2552, Dec. 27, 1934) (not yet officially reported, Prentice-Hall Trade & Industry Service, p. 8552);

United States v. *Gooch* (*No. 524*), 8 Fed. Sup. 1021 (Adv. Sheets, Jan. 28, 1935);

United States v. *McGraw-Curran Lumber Co. et al.* (*No. 523*), 8 Fed. Sup. 1021 (Adv. Sheets, Jan. 28, 1935);

Wilentz v. *Crown Laundry Service*, 172 Atl. Rep. 331;

State of Ohio v. *Gulatt* (Court of Common Pleas. Hamilton County, Ohio, May 5, 1934, Prentice-Hall Trade & Industry Service, p. 8183);

Mississippi Valley Hardware Co. v. *McClanahan*, 8 Fed. Sup. 388 (Adv. Sheets, Dec. 3, 1934).

In the first case above cited (*United States* v. *Gooch*), the District Court stated:

> "There is nothing dishonest or unfair in the mere underselling of a competitor in open market. A lower price than others are willing to accept for the same article in and of itself does not necessarily involve unfair competition on the part of the seller. *It has never been so considered by the courts or declared by Congress.* To do so would tend to check efficiency in production and distribution. There must in addition be some ingredient harmful in nature and wrong in principle, such as price cutting for the purpose of destroying a competitor and creating a monopoly, contrary to public policy, but nothing of that kind is presented here in the pleadings or proof upon the application for a preliminary injunction." (Italics the writer's.)

In the case of *United States* v. *Sutherland* (*supra*), the District Court held:

"PRICE FIXING NOT EXPRESSLY AUTHORIZED BY CONGRESS.

1. The statute certainly does not expressly authorize the President or any other to fix retail lumber or any prices. It does authorize the President to approve for certain industries codes of fair competition and gives to the approved codes the force of law. If a price fixing code is not a code of fair competition then it is not one which the statute authorizes.

To call a set of regulations a code of fair competition does not make it one. Any given set of regulations, if challenged, or any regulation in the set, if challenged, must be tested to determine whether it has any possible relationship to the subject of fair competition.

The statute does not define the phrase 'fair competition' but that phrase and the words in it are common and of well understood significance. 'Fair competition' is 'open', 'equitable', 'just' competition. It is a competition which is fair as between competitors and as between any of them and his customers. But 'fair' competition must still be 'competition'. The adjective does not destroy the noun. Competition is 'the effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms'. Webster's New International Dictionary. *To prohibit one of two who are dealing in the same commodity to offer that commodity at a lower price than the other offers it is not to effect fair competition but is to destroy competition in its very essence.*

Fair competition must be the opposite of unfair competition. 'Unfair competition' many times has been judicially defined. 'The essence of the wrong

in unfair competition consists in the sale of goods of one manufacturer or vendor for that of another.' *Howe Scale Co.* v. *Wyckoff*, 198 U. S. 118, 140; *Hanover Co.* v. *Metcalf*, 240 U. S. 403, 412. In the multitude of cases, federal and state, which have dealt with the subject of unfair competition, it is doubtful if there can be found one in which the underselling by one of another, without any fraud or misrepresentation, was held to be unfair competition. If so selling is not unfair competition it is fair competition. *When Congress used that phrase the presumption is it used it as the phrase generally is understood.*

PRICES FIXED HERE UNAUTHORIZED BY STATUTE.

2. But whether it can be said that Congress did not intend to authorize price fixing to any extent whatever when expressly it only authorized approval of codes of fair competition it certainly must be said that it did not authorize arbitrary price fixing. Any price fixing is inconsistent with the historic conception of competition but if that consideration be laid aside and if it be said that one who sells his own goods in competition with other vendors of like goods may be unfair to them when he undersells them that conclusion must be reached through the application of some rational standard of fairness and not by the *ipse dixit* of an official. And the standard must be one that can be expressed in formula. If it is not one that can be so objectively perceived then in no true sense is it a usable standard; at most it is no more than the whim of an individual.

In the statute enacted by Congress no standard for determining what is fair competition is provided. The standards already established in the law and any other rational standard were, therefore, available for use." (Italics the writer's.)

In *Mississippi Valley* v. *McClanahan* (*supra*), the District Court held:

> "In this case, complainants ask for injunctive relief against the District Attorney to prevent arrest, indictment, and prosecution for violating the so-called 'price-fixing' or 'price protection clause' of the Hardwood Lumber Code, organized under the National Recovery Act.
>
> There is no mention in the Act itself of price-fixing or price protection. The act itself authorizes the various industries to compile codes of 'fair competition' which become law on the approval of the National Recovery Director.
>
> The words 'fair competition' by a long series of judicial decisions have been fully defined. These definitions do not include price fixing. Competition has these elements: 1st—Price; 2nd—Quality and 3rd—Service. Price regulation is the antithesis of competition, fair or otherwise.
>
> From time to time, as witness the Lever Act, legislative bodies have fixed maximum prices with doubtful success. No legislative body has ever fixed a minimum price to my knowledge. To hold that Congress in the National Recovery Act has fixed a minimum price by implication is to carry judicial construction too far.
>
> The court concedes the power of Congress to fix prices, under certain circumstances, on goods moving in interstate commerce. *There is nothing in the N. R. A. to show that such was the intention of Congress. The very term, 'fair competition', negatives any such construction.*
>
> It is an intolerable situation for citizens to hold salable property which they dare not fix a price on for sale purposes, without fear of criminal prosecution. Complainants are entitled to the injunctive relief sought against the District Attorney, limited, of course, strictly to the price fixing or price protec-

tion feature of the Hardwood Code." (Italics the writer's.)

In asserting that Codes under the New Jersey Recovery Act (comparatively similar to the National Industrial Recovery Act) granted no right to fix prices the Court of Chancery in *Wilentz* v. *Crown Laundry Service* (*supra*) said:

> *"But, even granting to the Legislature the utmost power which has been claimed for it, it must still be conceded that the exercise of such power requires explicit unambiguous language. It will not be presumed in the absence of such language that the Legislature intended to grant to the Governor or to any subordinate body, such as the code authority, power to fix minimum prices below which businessmen of New Jersey cannot lawfully sell their goods or services.* I turn again to chapter 372. 'Fair competition', the only authorized subject of the code, may be taken as the opposite of 'unfair competition', a term which has long been employed by the courts. It has generally been understood to mean a form of competition involving deception of the public as by the imitation of trade-names, labels, etc. The United States Supreme Court, referring to the Federal Trade Commission Act (15 U. S. C. A., Sec. 41 *et seq.*) has said: 'The words "unfair method of competition", are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honor-

able opponents in trade.' *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 40 S. Ct. 572, 575, 64 L. Ed. 993; *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565, 44 S. Ct. 162, 68 L. Ed. 448, 30 A. L. R. 1114. *Price cutting by itself, has never been considered unfair competition. Sears, Roebuck* v. *Federal Trade Commission* (C. C. A.), 258 F. 307, 6 A. L. R. 358." (Italics the writer's.)

Our position on this point is further supported by the decision in *State of Ohio* v. *Gullatt Cleaning, etc. Co.*, Court of Common Pleas, Hamilton County, Ohio, decided May 5, 1934, where the court, in considering the same language used in the state statute as in the National Industrial Recovery Act, said:

"Unfair trade and monopolies are familiar terms in the law and undoubtedly have received such general currency that most people know their meaning in a general way. But unfair trade or unfair competition in the meaning of the law, and also in the common understanding, has in it the element of fraud or misrepresentation, or other recognized unethical conduct.

* * * * * * * *

"Unfair competition does not include price cutting or any other method of acquiring trade that does not involve deception of the public or an infringement of the rights of the competitor. Nims on Unfair Competition (3rd Ed.), Sec. 300.

"The codes, which the act authorizes as binding upon all regardless of any contractual obligation, therefore, must be limited by the principle set forth in the law, that is, to regulations to eliminate unfair competition, prevent monopolies and discrimination against small enterprises. In other words, the prohibitory regulation must conform to the legal concept of unfair competition."

In still another decision emanating from the State of Ohio, decided in February, 1935 *wherein the precise price fixing and price control features of this Code of Fair Competition for the Motor Vehicle Retailing Trade was involved, the Court in holding unconstitutional the Ohio Industrial Recovery Act, said:*

> "This Court is of opinion that even waiving the foregoing for the purposes of this case that the Act itself does not purport on its face to authorize the so-called Code Authorities to fix the prices at which used automobiles may be taken in by a new car dealer. The most that the Act can be held to authorize is to adopt codes against 'unfair competition'. 'Unfair Competition' is not defined in the Act. It must, therefore, be held now to have the same meaning as had theretofore been given to it prior to the passage of the Act. As pointed out by Matthews, *Judge*, in *State ex rel. Schneider* v. *Laundry Co.*, 32 Ohio Nisi Prius (N. S.) at page 138:
>
> > 'Unfair Competition does not include price cutting or any other method of acquiring trade that does not involve deception of the public, or an infringement of the rights of the competitor • • •. The Legislature must be presumed to have known of this judicial definition of unfair competition when it enacted House Bill No. 705.'
>
> "See also *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 at 427; *Sears, Roebuck & Company* v. *Federal Trade Comm.*, 258 Fed. 307."

State ex rel. D. J. Haskins v. *Farber Motor Sales, Inc.*, in the Court of Common Pleas of Franklin County, Ohio, 143,980, as yet unofficially reported.

We respectfully submit, in view of the foregoing cases decided by this Court, and also authoritative decisions of lower courts involving the point raised herein, that the approval and adoption by the President of Article IV of

the Code of Fair Competition for the Motor Vehicle Retailing Trade, was beyond the scope of the provisions of the National Industrial Recovery Act, and such approval, even if administrative in character, is a nullity.

We submit further, that there can be no doubt, and it was so held by the statutory court in the case at bar, that the provisions of Subdivision A of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, are price regulation, price control and indeed price fixing. In view of this holding, we may look to the legislative intent of Congress in the debates on the National Industrial Recovery Act to learn and ascertain whether or not, under any conception of the Act, Congress authorized or even intended any price control, price regulation or price fixing. The following clearly negatives any intent to permit such price regulation or price fixing.

Senator Borah vigorously opposed the NIRA on the theory that it permitted price control by industry (77 Cong. Rec. 5264 *et seq.*, 1933) and offered an amendment, which was adopted by the Senate, reading as follows:

> "Provided such Code or Codes shall not permit combinations in restraint of trade, price fixing, or other monopolistic practices" (77 Cong. Rec. 5382).

In conference the provision was changed to read:

> "Provided such Code or Codes shall not permit monopolies or monopolistic practices" (77 Cong. Rec. 5933).

Senator Borah in a sharp attack upon the conferees contended that the aforesaid change had in fact validated price fixing (77 Cong. Rec. 5933, 5939 *et seq.*). In response to Senator Borah's contention, the purpose of the change of the Amendment offered by Senator Borah was explained by Senator Wagner (77 Cong. Rec. 5939.

See also 77 Cong. Rec. 5265, 5378, 5379, 5380). It was not the intention of the conferees, he argued, to permit monopolistic price fixing. The Bill, he thought, was explicit on that score. But the terms "restraint of trade" and "price fixing", he felt were broader than monopoly and, as construed by the Courts, *included not merely objectionable price fixing* but concerted action to fix minimum wages, to prevent sales below cost, and trade agreements which affected price. He further contended that it was not the intention of the sponsor of the Bill nor was the Borah Amendment so designed as to legalize direct price fixing.

No clearer manifestation of the legislative intent with regard to its view on price fixing can be found in any of the Congressional debates on the N. I. R. A., than the most succinct admission of Senator Wagner, the sponsor of the bill, wherein he says:

> *"I do not mean to imply that the pending legislation contemplates price fixing."* (Congressional Record, 73rd Congress, First Session, p. 5258, June 7, 1933.)

The statement of President Roosevelt on the signing of the NIRA (June 16, 1933), contains the following succinct declaration of policy particularly affecting the intention of the sponsors of the Bill and his own views with respect to price fixing. He said:

> "Let me make it clear, however, that the Anti-trust laws still stand firmly against monopolies that restrain trade and price fixing which allows inordinate profits or unfairly high prices."

The position and intention of Congress in the enactment of the NIRA, we submit, is clear. No reasonable doubt exists that price fixing was never contemplated in the enactment of the NIRA.

Even aside from the clear manifestation of the intention of Congress not to permit any price control or price fixing, such power never in fact existed in Congress by virtue of the Constitution.

It cannot be denied that Congress has no police powers, for to admit such proposition would be to deprive the States of the residuary powers expressly reserved to them by virtue of the Ninth and Tenth Amendments to the Constitution.

Upon the question of whether or not Congress has police power, Article X of the Constitution of the United States must be borne in mind and is as follows:

> "Powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

Police power is that right which is inherent in all sovereign governments to enact laws to promote the order, safety, health, morals and general welfare of its society. However, between States on the one hand and Federal Government on the other, the Government is not absolutely sovereign, for, under the contract existent between the forty-eight States of the Union and the National Government, this power was never given to the National Government, but within the provisions of Article X, *supra,* has always been reserved to the State, which are sovereign in the exercise thereof.

In *In re Rahrer,* 140 U. S. 545, at 554, the court well says:

> **"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the states, not sur-**

rendered by them to the general government, nor directly restrained by the Constitution of the United States and essentially exclusive, and this court has uniformly recognized state legislation legitimately for police purposes as not in the sense of the Constitution necessarily infringing upon any right which has been conferred expressly or by implication to the National Government."

Page 555:

"In short, it is not to be doubted that the power to make the ordinary regulations of police remain with the individual states, and cannot be assumed by the National Government, and that in this respect it is not interfered with by the Fourteenth Amendment."

In *Keller* v. *The United States,* 213 U. S. 138, at 144, the court well says:

"Jurisdiction over such an offense comes within the accepted definition of the police power. *Speaking generally that power is reserved to the states for there is in the Constitution no grant thereof to Congress."* (Italics the writer's.)

In *Keller* v. *The United States, supra,* the Congress of the United States made it a Federal felony to harbor alien prostitutes. The act was held unconstitutional as a regulation of a matter within the police power reserved to the States and not within any power delegated to Congress by the Constitution, the court holding on page 148:

"That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. * * * While the acts

of Congress are to be liberally construed in order to enable to be carried into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. **To exaggerate in one direction and restrict in the other will tend to substitute one consolidated government for the present federal system.** We should never forget the declaration in *Texas* v. *White*, 7 Wall. 700, 725 that 'the Constitution in all its provisions looks to an indestructible union composed of indestructible states.'" (Emphasis ours)

Chicago, R. I. & Pacific R'way v. *Arkansas*, 219 U. S. 453;
Paterson v. *Kentucky*, 97 U. S. 501;
Barbier v. *Connelly*, 113 U. S. 27;
McCullough v. *Maryland*, 4 Wheat. 316;
Houston v. *Moore*, 5 Wheat. 148;
House v. *Mayes*, 219 U. S. 270.

As was well said in the *Civil Rights Cases*, 109 U. S. 3, at 14:

"If this legislation is appropriate for enforcing the prohibition of the amendment, it is difficult to see where it is to stop. Why may not Congress with equal show of authority enact a code of laws for the enforcement and vindication of all rights of life, liberty and property. If it is supposable that the states may deprive persons of life, liberty and property without due process of law (and the amendment itself does suppose this) why should not Congress proceed at once to prescribe due process of law for the protection of every one of these fundamental rights in every possible case, as well as to prescribe equal privileges in inns, public conveyances and theatres."

As was well said in the dissenting opinion in *Wilson* v. *New*, 243 U. S. 332, at 367:

> "It results from the principles which have been enforced in this Court and recognized by writers of authority that due process of law when applied to the legislative branch of the government will not permit Congress to make anything due process of law which it sees fit to declare such by the mere enactment of the statute; if this were true, life, liberty or property might be taken by the terms of the legislative act, dependent for its authority upon the will or caprice of the legislature and constitutional provisions would thus become a mere nullity."

In *Hammer* v. *Dagenhart*, 247 U. S. 251, Mr. Justice Day states:

> "There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such condition. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in the use in other states and approved by Congress.
>
> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce and not to give it *authority to control*

the states in their exercise of the police power over local trade and manufacture." (Italics the writer's.)

In *United States* v. *Eason Oil Co.*, 8 Fed. Supp. 365, following the authorities hereinabove quoted and in denying an injunction to restrain violations of an oil regulation of the Secretary of Interior, the Court stated:

> "But the fact that the state has power to fix intrastate prices or regulate intrastate business does not in any way justify the conclusion that Congress has the same power, for the only power that Congress has to deal with commerce, is to regulate commerce among the several states.
>
> Cooley in his Constitutional Limitations, Volume 2, 8th Edition, page 1232, said:
>
> 'In the American constitutional system the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. Neither can the national government through any of its departments or officers, assume any supervision of the police regulations of the States. All that the Federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution.'"

See also:

United States v. *Gooch* (*supra*);
Miss. Valley v. *McClanahan* (*supra*);
Wilentz v. *Crown Laundry Service* (*supra*);
United States v. *Sutherland* (*supra*);
State of Ohio v. *Gulatt* (*supra*).

The Code comes neither within the provisions of the interstate commerce clause of the Constitution, nor can it be made a law of the land by Congress by reason of an assumption of the right to exercise a non-existent police power.

We believe that the foregoing has conclusively proven that Congress has no police power.

Assuming the same to exist, does N. I. R. A. come within the exercise of such power? As has been shown, the right of a State to legislate in matters encompassed within the police power is undoubted, so that it must follow that if a State in the attempted exercise of police power could not legislate with respect to the matters embraced in N. I. R. A. then no sovereignty could so legislate.

This is so, for police power is not enlarged by the importance of the Government seeking to exercise it. It arises from sovereignty, and when existent, is no more extensive for the most exalted Government than it is for the most humble. The sphere of the police power is the same for all governments.

It follows from the foregoing, that Congress never intended to legalize price fixing, price control or regulation, and in fact, never having that power, the Act of the President in approving Subdivision A of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, transgressed beyond the powers granted unto him.

We respectfully submit therefore, that Article IV, Subdivisions A and B (with the exceptions hereinabove noted), is void and invalid, and the attempt of the appellee to prosecute the appellant for an alleged violation thereof, is in direct violation of the fundamental provisions of the Fourteenth Amendment to the Constitution, and deprives the appellant of its liberty and property without due process of law.

POINT III.

The Code of Fair Competition for the Motor Vehicle Retailing Trade including Article IV thereof, and Chapter 781 of the Laws of 1933 of the State of New York, violate the Constitution of the State of New York, and the attempted enforcement of the provisions of said code by the appellee against the appellant deprives the appellant of its liberty and property without due process of law, in derogation of the Fourteenth Amendment.

In the discussion of the foregoing proposition, it is necessary to bear in mind the following dates:

1. June 16th, 1933, National Industrial Recovery Act adopted.

2. August 26th, 1933, Chapter 781 of the Laws of 1933, State of New York, in effect.

3. October 3rd, 1933, Code of Fair Competition for the Motor Vehicle Retailing Trade approved by the President of the United States. (In effect November 3, 1933.)

4. December 3, 1935, certified copy of Code of Fair Competition for the Motor Vehicle Retailing Trade filed with the Secretary of State of New York.

The pertinent provisions of Chapter 781 of the Laws of 1933, are the following:

NEW YORK

LAWS OF 1933, CHAPTER 781

(Effective August 26, 1933)

AN ACT to provide for codes of fair competition for trades, industries and subdivisions thereof.

Agreements, licenses, rules and regulations pursuant to the provisions of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, as affecting intrastate commerce within the state.

Became a law August 26, 1933, with the approval of the Governor. Passed, on message of necessity, three-fifths being present.

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. LEGISLATIVE FINDING; STATEMENT OF POLICY.—A national emergency productive of widespread unemployment and disorganization of industry, which likewise prevails in the state of New York, which burdens intrastate, interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people and of the people of the state of New York, is hereby declared to exist. The existence in this state of such present acute economic emergency, and the effects and certain causes thereof as declared in section one of title one of the national industrial recovery act, enacted by the congress of the United States, effective June sixteenth, nineteen hundred thirty-three, are hereby recognized; and it is hereby declared that said emergency, the causes and effects thereof, as so declared, relate as well to commerce in this state wholly intrastate in character as to interstate and foreign commerce and transactions affecting interstate and foreign commerce carried on in this state. It is hereby declared to be the policy of this state to cooperate in the furtherance of the objects and purposes declared in said act of the congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and

industry with those of interstate commerce required by the provisions of the said national industrial recovery act which are applicable in interstate commerce in the state of New York.

§2. FILING OF CODES AND AGREEMENTS.—1. The secretary of state is hereby authorized to receive for filing and shall file in the office of the department of state a copy of each code, agreement, license, rule or regulation in effect pursuant to such act of the congress, pertaining, affecting or in any way relating to the conduct of business in the state and duly certified as a true copy of such document or documents by the officials in charge of the administration of the provisions of title one of the said national industrial recovery act or by their duly authorized agents. Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the President of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said National Industrial Recovery Act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense, and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.

2. The secretary of state shall cause to be printed a sufficient number of copies of each such code, agreement, license, rule or regulation and the same shall be kept available for distribution upon request therefor.

3. If in any such code, agreement, license, rule or regulation, power is conferred upon any person or group of persons to subpoena witnesses, compel the production of books, papers and records, the attendance of witnesses or to take their testimony, a like power shall be deemed to have vested in such person or group of persons with regard to matters and things of a wholly intrastate character.

§8. DURATION.—This act, in so far as it affects agreements, codes, rules or regulations, shall become ineffective contemporaneously with the expiration of said national industrial recovery act, provided for by section two (c) of said act, and in so far as it affects licenses, contemporaneously with the expiration of the said National Industrial Recovery Act, as provided for in section four (b) of said act.

We respectfully contend that Chapter 781 of the Laws of 1933 of the State of New York, is invalid and unconstitutional being in derogation of the Constitution of the State of New York (a) in the manner of its enactment, and (b) as a delegation of legislative power by the New York State Legislature.

By Article III, Section 1 of the New York State Constitution, there is vested in the Senate and Assembly, the power to legislate. Article III, Section 17 of this Constitution, provides as follows:

> "No act shall be passed which shall provide that any existing law or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act."

The object, purpose and intent of said provision is tersely stated in the following two New York cases:

In *People ex rel. N. Y. Electric Lines Co.* v. *Squire*, 107 N. Y. 593, at page 602:

> "The object and intent of the constitutional pro-

vision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance and misapprehension on the part of the legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly. It is obvious that it does not apply to an act purporting to amend existing laws, for in such a case no intelligent legislation could be had at all without a knowledge of the law intended to be amended. It must be presumed that the legislature is informed of the condition of a law which it is called upon to amend:"

In *People ex rel. Commissioner* v. *Banks*, 87 N. Y. 568, at page 575:

"* * * The evil in view in adopting this provision of the Constitution was the incorporating into acts of the legislature by reference to other statutes of clauses and provisions of which the legislators might be ignorant, and which affecting public or private interests in a manner and to an extent not disclosed upon the face of the act, a bill might become a law which would not receive the sanction of the legislature if fully understood."

The State Legislature at Albany makes N. I. R. A. and the Code the law of New York without the slightest knowledge of what the same contains; upon no consideration given them in its legislative debates and solely by reason of their enactment by another legislative body. In the light of the clear, unambiguous pronouncement of the Constitution of the State of New York, Chapter 781 is unconstitutional.

In further support of the above proposition, the holdings of sister States are most enlightening. The State

of Maine by reference adopted the Act of Congress with respect to intoxicating liquors and made it a law of that State. Its constitutionality being questioned, the Court held in *State* v. *Intoxicating Liquors*, 121 Me. 438:

> "It is clear upon reading the Act of 1919 that the legislature intended thereby to adopt and incorporate into the statute law of the State any definition of the term 'intoxicating liquors' * * * then or thereafter declared by congressional enactment or by decision of the Supreme Court of the United States.
>
> The precise question presented for our decision therefore is whether the Act of April 4th, 1919, so far as it purports to incorporate by reference into the section thereby amended, *future* enactments of Congress, establishing a rule, test or a definition of intoxicating liquors and declaring such liquors to be intoxicating * * * is valid.
>
> We have no hesitation in answering the question in the negative. Under a constitution in which the legislative power is vested, as in the Constitution of Maine, 'in two distinct branches, a House of Representatives and a Senate, each to have a negative on the other, and both to be styled the legislature of Maine' * * * *such legislation constitutes an unlawful delegation of legislative power, and an abdication by the representatives of the people of their power, privilege and duty to enact laws.*" (Italics ours.)

Passing upon the precise same point, in *Opinion of Justices*, 239 Mass. 606, the judiciary of Massachusetts held the same procedure unconstitutional, saying at page 609:

> "One distinguishing characteristic of that bill is that in several sections it incorporates by reference

laws made and to be made by the Congress of the United States, and regulations made and to be made thereunder, for the purpose of establishing offenses to be punished by fine. It is attempted by these sections and possibly by other sections to make the substantive law of the Commonwealth in these particulars change automatically so as to conform to new enactments from time to time made by the Congress and new regulations issued pursuant to their authority by subsidiary, executive or administrative officers of the United States.

It purports to create offenses and impose punishments therefor, not by definition and declaration, but by reference to what may hereafter be done in these particulars by the Congress of the United States, and thus by it authorized to establish regulations.

We are of opinion that legislation of that nature would be contrary to the constitution of this Commonwealth. Legislative power is vested exclusively in the General Court, except so far as modified by the initiative and referendum amendment. It is a power which cannot be surrendered or delegated or performed by any other agency.

This firm general principle is not affected by the fact that by the Eighteenth Amendment to the Federal Constitution, 'concurrent power to enforce National Prohibition' by appropriate legislation as 'vested in Congress and in the several States.' The words 'concurrent power' do not imply a surrender by either to the other of the power to legislate."

Page 611:

"There are numerous instances where power to establish local ordinances or administrative regulations may be vested by statute in a subsidiary governmental division or in a Board or Commission. **No discussion is required to demonstrate that the Congress of the United States cannot be treated**

as a subsidiary board or commission by the General Court." (Emphasis ours.)

In addition to the foregoing authorities, three New York State Supreme Court decisions condemn the New York State Recovery Act (Chapter 781 of the Laws of 1933), in well written opinions. In the first, *Darweger* v. *Staats*, 156 Misc. 522, the Court had this to say (in part):

> "The plaintiff here is not engaged in interstate commerce. His business is a purely intrastate business. All of his purchases are made and all of his sales are made within the State of New York. While the questions presented by the National Industrial Recovery Act are of the gravest importance; while they involve questions which may determine the continued existence, or the destruction of our constitutional system of government, it is not for this Court to determine such questions upon these motions. The NIRA of itself does not and cannot control the manner in which plaintiff shall conduct his business, or fix the price at which he shall sell his product while engaged in purely intrastate transactions. It has not yet been held under the Constitution that the Congress has control of purely intrastate commerce.
>
> It is claimed, however, that the plaintiff is bound by the Code adopted by the National Recovery Administration under the NIRA relative to his business, because of the provisions of the so-called Schackno Law (Chap. 781, Laws of 1933). This contention necessitates an examination of such enactment.
>
> The Schackno Act, §1, declares the existence of a national emergency, using the identical language of the NIRA, then inserts similar declarations that the emergency likewise exists in this state, and affects the welfare and undermines the standard of living of the people of the State of New York, and

declares that the emergency, the causes and effects thereof as declared in the national Act, relate as well to commerce wholly intrastate in character as to interstate and foreign commerce. It then provides that it is declared to be the policy of the state to co-operate in the furtherance of the objects and purposes declared in the national Act, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce, as required by the provisions of the NIRA.

Section 2 authorizes the filing of certified copies of codes in the office of the Secretary of State, and provides—

> 'Upon such filing of a copy so certified of a code of fair competition for any trade, industry or subdivision thereof, as approved by the president of the United States, or of any agreement or license or of any rule or regulation provided for under title one of the said national industrial recovery act, such code, agreement, license, rule or regulation shall be the standard of fair competition for such trade or industry or subdivision thereof in the state as to transactions intrastate in character, and *any violation of any provision of such code, agreement, license, rule or regulation shall be a misdemeanor, and upon conviction thereof, the person convicted shall be fined not more than five hundred dollars for each offense,* and for each day such violation continues a separate offense subject to the fine herein prescribed shall be deemed to have been committed.' (Italics ours.)

Section 3 invests the Supreme Court of the State of New York with jurisdiction to prevent and restrain violations of any codes filed pursuant to the act.

Section 5 suspended the operation of the state anti-trust laws during the time the act was in effect.

It is urged that this Act merely declares the policy of the state to co-operate and provides the means by which the declared legislative intent is to be carried into effect.

Undoubtedly the general rule laid down and uniformly followed is, that a statute may validly provide that the object or the standard of the statute may be attained through a form of procedure or administration found in or pursuant to some other enactment (*People ex rel. Commissioners* v. *Banks*, 67 N. Y. 568; *People ex rel. Everson* v. *Lorillard*, 135 N. Y. 285; *Watkinson* v. *Hotel Pennsylvania*, 195 App. Div. 624, aff'd 231 N. Y. 562). The fact that the operation of a statute in particular instances is dependent upon or affected by a future contingency in no way affects its validity (*People* v. *Long Island Railroad Co.*, 134 N. Y. 506; *Stanton* v. *Board of Supervisors*, 191 N. Y. 428; *People ex rel. Unger* v. *Kennedy*, 207 N. Y. 533). 'Mere novelty is no objection to legislation' (*People ex rel. Durham R. Corp.* v. *La Fetra*, 230 N. Y. 429; *People* v. *Nebbia*, 262 N. Y. 259, 271).

The Schackno Act does more than merely declare a policy and provide means to carry it into effect. The NIRA is not adopted, but it is declared to be the policy of the State of New York to conform in intrastate commerce and transactions with its purpose and administration. Codes adopted under the NIRA are made, though not in existence, by reference those of the State of New York. The act adopts not a law of the Congress, but a body of rules and regulations prepared by individuals, approved by an administrative authority and finally approved by the President, and then provides that upon filing a certified copy in the office of the Secretary of State, a violation of any provision of such

code so adopted and filed, is a crime under the laws of the State of New York. *To term such a method of legislation, such a manner of attempting to create criminal offenses, vicious, is to indulge in mild criticism. To hold such a legislative act constitutional seems contrary to the plain language and import of our fundamental laws, both national and state.*

The Constitution of the State of New York provides (Article III, §1): 'The legislative power of this State shall be vested in the Senate and Assembly'; and by §17 provides, 'No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.'

The vast increase in public business, the justifiable or unjustifiable invasion of business affairs through government intervention and the complexities of modern civilization are indicative of the fact that public business cannot be transacted today without some delegation of power to administrative officers or bodies. When the legislative act prescribes a method and declares a policy there has been a continuous advance in the granting to administrative bodies and executive officials power and authority to adopt rules and prescribe methods for carrying such enactments into effect. The Schackno Act, however, does not vest in any state authority power to enact rules and regulations or exercise legislative power. It does not provide a criminal penalty for the violation of the act itself, but prescribes a criminal penalty for *'any violation of any provision of such code, agreement, license, rule or regulation'. It thus creates a crime for the violation of something which did not exist when the act was adopted, of the terms, conditions or provisions of which the legislature could have had no knowl-*

edge or information and of a body of rules and regulations to be prepared by some individuals unknown, adopted by a Federal administrative body and approved by the Chief Executive of the United States.

The legislative power is vested in the Senate and Assembly. The nation is still an 'indivisible union of indestructible states'. The state within its boundaries is sovereign. The laws that govern its citizens in purely intrastate matters within its borders and the acts which will convert its citizens into criminals must be those specified by the state and its authority.

The legislature cannot delegate the sovereign powers of the state to an administrative or executive authority of a foreign jurisdiction. It cannot surrender the sovereignty of the state to declare the acts constituting a crime to Federal executive or administrative authority.

> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people' (Art. X, U. S. Constitution, 10th Amendment).

It seems to us, without attempting to enter into any extended analysis or discussion, that such a statute is violative of the provisions of the Constitution of the State of New York above referred to, as well as contrary to every principle upon which our republican institutions are based.

While the issues in this case are not identical, we agree with the reasoning and conclusions expressed in *Cline* v. *Consumers Co-operative Gas & Oil Co.*, 152 Misc. 653, in which the question of the constitutionality of the Schackno Act is clearly and learnedly discussed. Our conclusion is likewise sustained in *People* v. *Grant*, App. Div., Third Dept., November 2, 1934, unreported. The language there

used applies with equal force to the Schackno Law—'While the legislature may delegate the power to make rules and regulations and give them the force of law, it may not delegate the power to create crimes and prescribe the penalties therefor.' Under the Schackno Law the legislature has attempted to delegate the power to make rules and regulations and give them the force of law to Federal authority and granted to that authority the right to specify and create crimes in the State of New York. 'The legislative discretion to declare a crime has been attempted to be delegated to the board. This is not only the delegation of an administrative act, but also the delegation of the substantive power to determine a crime.' (*People* v. *Grant, supra.*) We can see no distinction except that in the Schackno Law, the power to declare what acts shall constitute the crime is attempted to be delegated by the legislature to Federal administrative authority instead of state administrative authority. Clearly under such conditions the attempt is in violation of the constitution of the state." (Italics ours.)

And concluded with the following:

"We hold that Subdivision 1 of §2 of Chapter 781, Laws of 1933, is in violation of the Constitution of the State of New York, Article III, §§1, 17, and void; *that it is an unwarranted attempt to delegate the power to create a crime; that the declaration of the acts constituting a crime rests with the legislature and cannot be delegated to Federal administrative or executive authority.*" (Italics ours.)

In the second case, *De Agostina, as President, etc.* v. *Parkshire Ridge Amusement Inc.*, the Supreme Court of the State of New York, Kings County, when called upon to decide the constitutionality of Chapter 781 of

the Laws of 1933, on February 2nd, 1935 (93 New York Law Journal, p. 63), again declared the same to be invalid in an opinion which reads in part as follows:

> "If the reasoning thus far be fallible, there nevertheless remains a complete answer to the defendant's claim. The defendant's brief vigorously asserts that its action was founded on the N. I. R. A., the Motion Picture Code adopted under it, and the State Recovery Act, and that it was under the compulsion of these that the plaintiffs were discharged. But this assertion is met by the plaintiffs' argument that the N. I. R. A. and the code adopted under it have no application to the facts and that the State Recovery Act is unconstitutional.
>
> That congressional justification for the N. I. R. A. is derived from the 'commerce clause' of the United States Constitution is plainly apparent from a reading of the statute. The defendant concedes that, inasmuch as its business is conducted wholly within the state with no feature of it involving or affecting interstate or foreign commerce, the provisions of the N. I. R. A., standing alone, are inapplicable to the facts presented. The defendant's case is rested on the State Recovery Act. Section 1 thereof declares the existence of a national emergency, prevailing likewise in the State of New York, which burdens intrastate, interstate and foreign commerce recognizes that the declaration of emergency contained in the N. I. R. A. relates as well to intrastate commerce within this state; and announces it to be the policy of the state 'to cooperate in the furtherance of the objects and purposes declared in said act of Congress, and each and every provision of this act shall be construed in accordance with the policy so declared, and to make uniform the standards of fair competition prevailing in intrastate commerce and industry with those of interstate commerce required by the provisions of

the said N. I. R. A. which are applicable in interstate commerce in the State of New York.' Section 2 provides for the filing with the secretary of state of codes and agreements approved and licenses issued pursuant to the provisions of the N. I. R. A. affecting the conduct of business in the state. Violations of the codes or agreements so filed are declared to be misdemeanors punishable by a fine of not more than $500 for each offense and for each day such violation continues. Section 3 vests the Supreme Court with jurisdiction to restrain the violation of any code or agreement filed pursuant to this act and to restrain any act within the state tending to defeat or hamper the effectiveness and operation of the N. I. R. A. at the instance of any party whose interests are or may be adversely affected by such violations or acts.

The desirability of subjecting those engaged in intrastate commerce within the state to the same standards of fair competition applicable to those engaged in interstate commerce within the state cannot be questioned. Nor may one doubt that the method adopted by the state to equalize standards of commercial conduct is calculated to prevent duplication with its attendant expense and perhaps confusion. But these considerations, salutary as they may be, cannot be employed as a means of levelling constitutional barriers. While the State Recovery Act does not purport to make the N. I. R. A., or any of the codes adopted thereunder the law of this state, it does provide that in the field of intrastate commerce violations of the federal statute and the codes may be punished or restrained where such violations occur within the state. The Legislature has not alone declared a policy but has created a new crime, the definition of which is left to agencies foreign to the state. By indirection the entire machinery for the adoption of codes and agreements and the issuance of licenses

under the federal statute is carried into the state act. The question is whether this short cut to a perhaps desirable end is sanctioned by the state constitution. Article III, section 17 of the Constitution reads as follows: 'No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.' In *People ex rel. N. Y. Electric Lines Co.* v. *Squire* (107 N. Y. 593, 602), the court said:

'The object and intent of the constitutional provision was to prevent statute laws relating to one subject from being made applicable to laws passed upon another subject, through ignorance or misapprehension on the part of the Legislature, and to require that all acts should contain within themselves such information as should be necessary to enable it to act upon them intelligently and discreetly.' While a constitutional provision intended to operate as a restraint upon the Legislature is not to be so construed as to embrace cases not fairly within its general purpose or policy (*People* v. *Lorillard*, 135 N. Y. 285, 288) it is not to be so construed as to nullify the constitutional limitation. In this case the court is not free to assume that the State Legislature was familiar with the terms and provisions of N. I. R. A. or that it was even familiar with its broad outlines. Nor can it be assumed that the law would have been adopted had the Legislature been fully acquainted with the N. I. R. A. Whether the Legislature acted with full knowledge of what was being done or through ignorance or misapprehension is left to conjecture. For all that appears the Legislature was not exercising its own judgment but relying solely upon the wisdom of the federal enactment. It has thus

accomplished the very evil sought to be avoided by the constitutional prohibition.

Article III, section 1, of the State Constitution provides that 'The legislative power shall be vested in the Senate and Assembly.' This power may not be abdicated by delegation to others. A Legislature may, however, delegate to some other agency of the government the power to determine facts and conditions upon which the operation of the statute depends (*People ex rel. Doscher* v. *Sisson*, 222 N. Y. 387; *Matter of Trustees of Village of Saratoga Springs* [*Saratoga Gas, &c., Co.*], 111 N. Y. 123). That some future contingency controls the operation of the statute does not affect its validity (*People ex rel. Unger* v. *Kennedy*, 207 N. Y. 533). Once the legislative policy is outlined and its controlling general principles fixed, an administrative agency, within the limitations prescribed, may be charged with the duty of carrying the statute into operation (*Panama Refining Co. et al.* v. *Ryan et al.*, 78 Adv. Op. 233, 55 Sup. Ct. Rep. 241; *United States* v. *Shreveport Grain & El. Co.*, 287 U. S. 77; *United States* v. *Grimaud*, 220 U. S. 506; *Buttfield* v. *Stranahan*, 192 U. S. 470). It seems to have been assumed in all of the decisions on the subject that the administrative agency employed, if not the creature of the Legislature, is at least an agency of the state or government whose law is being executed. *But here the Legislature has left the operation of the state statute, not to any state administrative agency, but to the President of the United States.* Under the N. I. R. A. the President is empowered to adopt codes and agreements affecting industries engaged in interstate commerce and yet if the State Recovery Act be upheld, the President would be given a like power over purely intrastate transactions. It may be urged that the Legislature, in exacting compliance with the codes and agreements in so far as they affect intrastate commerce

within the state, has merely invoked the machinery existing under the N. I. R. A. as the most practical means of equalizing standards of fair competition. Assuming for the moment that the means adopted is more practical and convenient than the establishment by the state of its own code authorities modeled after the federal system, that alone presents no justification for what has been done. Extreme caution should be exercised in safeguarding the state's sovereignty. The Legislature should neither invite federal encroachment nor surrender to foreign agency, over which it has no control or supervision, powers given solely to it by the people. 'Illegitimate and unconstitutional practices get their first footing by silent approach and slight deviations from legal modes of procedure' (*Boyd* v. *United States*, 116 U. S. 616, 635). While co-operation between the state and federal government for the achievement of some end may be highly desirable, such co-operative action must not involve an obliteration of state lines and a surrender of the state's inherent powers.

It may be said that no harm can result and much good may be accomplished by upholding this particular legislation. But if the state's power to delegate governmental functions to a foreign agency is sanctioned, there can be no legitimate limits to its exercise. As was said by Chief Justice Marshall in *Brown* v. *Maryland* (12 Wheat. 419, 439): 'Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed.' *The vice of the State Recovery Act lies in the fact that the procedure therein adopted, if approved, will facilitate subservience by the state or by its political subdivisions to a foreign entity not representative of or responsible to the citizens of the state whose local interests are being affected. The dangerous implications*

involved in any such state of affairs must be apparent.

In *Darweger* v. *Staats* (153 Misc. 522) the court, on an application for a temporary injunction restraining the members of the Divisional Code Authority of the Retail Solid Fuel Industry from interfering with the conduct of the plaintiff's business, fixing or attempting to fix the price at which he might sell his products within the state, or instituting proceedings against him for violation of the code provisions, held the State Recovery Act unconstitutional. In doing so, it was observed that 'the legislative power is vested in the Senate and Assembly. The nation is still an "indivisible union of indestructible states." The state within its boundaries is sovereign. The laws that govern its citizens in purely intrastate matters within its borders and the acts which will convert its citizens into criminals must be those specified by the state and its authority.' The Legislature cannot delegate the sovereign powers of the state to an administrative or executive authority of a foreign jurisdiction. It cannot surrender the sovereignty of the state to declare 'the acts constituting a crime to federal, executive or administrative authority' (p. 529). The opinion contains an excellent resume of the authorities together with the conflicting decisions which have arisen under the State Recovery Act." (Italics ours.)

It might be noted at this point that the two latter decisions were decided *subsequent* to the rendition of the opinion and decision in the case at bar, and the State courts refused to follow the reasoning of the lower Court in the case at bar.

In still another New York Supreme Court decision (*Cline as President of Independent Retail Petroleum Prod-*

ucts Dealers of Jefferson County v. *Consumers Cooperative Gas & Oil Co.*, 152 Misc. 653), in dismissing the Complaint of the plaintiff which sought to restrain the defendant from violating the price fixing provisions of the Petroleum Code, the Court declared the New York State Recovery Act unconstitutional in an elaborate opinion which we respectfully quote in part——

> "But, aside from this, the motion is made for a dismissal of this complaint on the further ground that the Schackno Act is unconstitutional in that the Legislature has no power to delegate to the President of the United States the power to legislate within the State of New York. The Constitution of the State of New York, Article III, §1, provides:
>
> > 'The legislative power of this State shall be vested in the Senate and Assembly.'
>
> Having so vested it, it has been uniformly held that they have no power to divest it, even to the people themselves. In other words, the Constitution of the State of New York created a representative form of government, and, for purposes of legislation, the people of the State made the Senate and Assembly, elected by them, their representatives for the purposes of legislation.
>
> *People* v. *Bradley*, 207 N. Y. 592.
>
> Certain limitations upon this power have been noted.
>
> In *People* v. *Kennedy*, 207 N. Y. 533, the Court of Appeals well said:
>
> > 'The proposition that by our constitution general powers of legislation are conferred exclusively upon the legislature, and that this body may not escape its duties and responsibilities by delegating such legislative powers to the people at large,

must be regarded as so thoroughly established that it needs no discussion.'

Now this subject of the power of the Legislature of the State of New York to delegate legislative power has been the subject of much consideration by the courts of this state. It has been said that, while the question of the expediency of an act, or of its operation, cannot be delegated, the Legislature may pass an act the operation of which in particular instances is dependent on or affected by a future contingency.

People v. *Long Island,* 134 N. Y. 506.

It has also been held that the Legislature may delegate to the electors of a restricted locality to determine whether a completed enactment passed by the Legislature shall become operative or shall be taken advantage of.

People v. *Kennedy,* 207 N. Y. 533;
Stanton v. *Essex County,* 191 N. Y. 428.

Here there were completed pieces of legislation applicable to a locality, and the Court held that giving the people of the locality the right to vote as to whether this particular piece of legislation should be operative upon them did not constitute a delegation of legislative power. It has been the uniform practice for the Legislature to confer upon municipalities of the state the authority to enact and enforce ordinances to execute and carry into operation the powers granted.

Buffalo v. *Stevenson,* 207 N. Y. 258.

It has been held that the Legislature may confer upon boards of health the power to enact sanitary ordinances.

Bellows v. *Raynor,* 207 N. Y. 389.

One of the most interesting cases on the subject

arose in reference to a grant of power to a public service commission to fix maximum rates to be charged by public service corporations. This was, on its face, such a delegation of legislative power that the matter was given voluminous consideration by our Court of Appeals in the case of

Saratoga Springs v. *The Saratoga Gas & Power Co.*, 191 N. Y. 123.

And the question was again considered in the case of

People v. *Wilcox*, 194 N. Y. 383.

Stripped of all learned discussion on the subject, it comes down to this: that, while the Legislature had the undoubted power, subject to the limitations of the Fourteenth Amendment to the Federal Constitution, to fix rates, it also had the power to enact that there should be maximum rates fixed and to provide that the public service commission, after full hearing, could fix a reasonable maximum rate. The decision rather turned on the practicalities of the situation. There are hundreds of municipalities in this state with different conditions and circumstances, with public service corporations serving them under peculiar and different states of fact and law, to such an extent that it is utterly impractical for the Legislature to legislate in each particular case; and the Court of Appeals held that giving the public service commission, under the restriction contained in the legislation, the power to fix reasonable maximum rates did not constitute an unlawful delegation of legislative power.

There are other instances of apparent delegation of power to make regulations, as in the Educational Department; but in every instance the law itself is declared by the act of the Legislature, and the regulations must follow within the law and are really details in administration of the law, rather

than delegations of power to make a law. The decisions of the courts in this state are unanimous upon the proposition that the Legislature of the state may not delegate its power to legislate to anyone.

The instances above noted where this has apparently been done by the Legislature, and the acts sustained by the courts, are not true instances of delegation of power to legislate; they are cases where the law has been declared by the Legislature, and the regulations are either purely administrative in character or, as possibly in the instance of the public service commission, quasi-judicial and subject to review at all times by the courts as to whether (1) the regulations are within the law and (2) whether they are reasonable or operate in violation of the Bill of Rights in the State Constitution or the Fourteenth Amendment to the Federal Constitution. Even in going the little way that the Court of Appeals has gone in this matter, it has expressed the view that, while the Legislature itself could have adopted these regulations, (and, to that extent, there was an apparent delegation of legislative power,) where the Legislature had set up a standard of action or had declared a principle of law and then authorized a public body to make regulations to carry it out, these regulations were really administrative in character. The Court has realized the point where representative government ends and bureaucracy begins.

It will be noted that whatever delegation of legislative power for administrative purposes has been allowed, has been allowed to public bodies set up by the Legislature of this State. A prime illustration of it is the creation of municipalities, with a definition of their powers, with an authorization to pass ordinances to make effective in the community the powers granted. The act creating the municipality was a completed act. As in other instances

where there are so many different conditions applying to different communities, and different methods of executing powers granted, it would be a practical impossibility for the Legislature to make specific rules and regulations denominated as municipal ordinances to enforce the powers granted to a municipality. And that is true of other administrative or quasi-judicial bodies created by the Legislature.

In the present instance we have an entirely different situation. The Schackno Bill *delegates a power to legislate, not to any agency of the State created by it, but to a foreign agency which in its nature has no powers of legislation excepting the power to veto Congressional bills, to wit, the President of the United States.* Under the National Industrial Recovery Act, the President is given the power to do three things: (1) to approve Codes prepared by the representatives of an industry or industries engaged in interstate commerce, subject to the limitations heretofore noted; (2) of his own motion, if complaint is made to him that practices inimical to the public interests and contrary to the policy declared in the Act are prevalent in any trade or industry, and, if no code of fair competition has been approved, after public notice and hearing to prescribe and approve a code of fair competition for such trade or industry, which shall have the same effect as a code of fair competition approved by the President under subsection '(a)' of this section (§703, subsection '(d)', N. I. R. A.); (3) to enter into agreements with and approve voluntary agreements between and among persons engaged in trade and industry, labor organizations, etc.,

> 'if in his judgment such agreements will aid in effectuating the policy of this chapter with respect to transactions in or affecting interstate or for-

eign commerce and will be consistent with the requirements of clause (2), subsection "(a)" of section 703 for a code of fair competition.'

If, under the State Constitution, this same power had been delegated to the Governor of the State, then we would have had the issue as to whether or not the powers delegated did amount to a delegation of legislative power contrary to the decisions of the Court of Appeals and in violation of the provisions of the State Constitution; and the issue then would be whether or not the legislation amounted to an actual delegation of power, as distinguished from authority to establish rules for carrying into operation a power granted by the Legislature. There can be no doubt that, on constitutional grounds, the Legislature has no power to delegate powers of legislation, *and in no event to a non-state-created agency.* I must therefore hold that the attempt to do this, as set forth in the Schackno Bill, is beyond the power of the Legislature.

It is urged that this is emergency legislation. The question, of course, as to whether there is an emergency is a question of fact, and it is assumed that, so far as the purposes of the Court are concerned, the declaration of the Legislature is sufficient evidence of the fact; but an emergency never awakened into existence a non-existing power. The power to declare war exists in Congress, and of course war creates an emergency, and legislation under the power which otherwise might be declared to be unconstitutional will perhaps be sustained, within proper limits, under the war power. Great catastrophes, such as flood, drought, earthquake, or questions of public health, seriously affecting the welfare of the country, under the Federal Constitution lay the foundation for the expenditure of public funds to relieve the catastrophe; and this of course applies, within proper limits, to such a

calamity as the depression through which we are passing, where the public welfare is involved. (United States Constitution, Article I, §8.)

Under the Commerce Clause, which grants to Congress the power to 'regulate commerce with foreign nations and among the several states,' the power of Congress is plenary to the extent that legislation is directed to that end.

There is no power, nor has there been any decision which recognizes a power in Congress to fix prices, either of labor or commodities. There is one case where price-fixing has been approved, and that is the case of *Wilson* v. *New*, 234 U. S. 332, which is a very interesting decision. As will be recalled, we were threatened in this country with a general strike on all the railroads of the United States; the railroads could not agree with their employees as to what wages would be paid. In the emergency, Congress passed a law temporarily establishing a standard of wages, pending a final agreement on the subject between the railroads and their employees, in order that commerce might continue. The issue in that case was whether Congress had the right to do that. Generally speaking, the right was denied by the Supreme Court of the United States in that case, excepting on account of an emergency which meant the total destruction of interstate commerce—and then only temporarily, until wages could be established by agreement. The force of this decision of course must be limited to the state of facts involved. In that case the Court held that an emergency did not create a power, that the power must exist apart from the emergency, and that, existing, the emergency might awaken the exercise of the power. That was an extreme case. The power never existed in Congress, under the United States Constitution, to deal with intrastate commerce; and, never existing, no emergency can awaken the exercise of it.

By analogy, *there is no power in the Legislature of the State of New York to delegate any of its legislative powers to any outside agency, as to the Federal Government or to the President of the United States.* To do so is to impair the sovereignty of the State itself. The source of authority in state government is the people of the state; and, because our state governments were in existence at the time of the Revolution, it has been generally assumed, and is the accepted judicial view, that the Legislature in a state has plenary law-making power, excepting as it has been limited by the express provisions of the State Constitution or by the Fourteenth Amendment to the United States Constitution. With these exceptions, the Legislature has plenary power and as to its acts there is no question of constitutionality involved.

Not so, however, with the Federal Government:— it has such powers, and only such powers, as are delegated to it by the Constitution directly or by necessary implication; all other powers are reserved to the States or the people.

If Congress had delegated to the President the power to legislate in reference to intrastate commerce, such power would be a nullity, as beyond the powers of Congress.

In the instant case, under the National Industrial Recovery Act the Congress made no attempt to deal with intrastate commerce; it only dealt with interstate commerce. If there is any dealing with intrastate commerce in the Code under question, it is by reason of the act of the industrial associations and the President, or the President alone, without any power derived from the National Industrial Recovery Act. *So that we have, in the present instance, in so far as the Code has any application to intrastate commerce, the act of an individual, outside of his powers as President of the United States; and the Legislature of the State of New*

York, under the Schackno Bill, has attempted to delegate to that individual its powers of legislation. This is beyond its power to do. If the Legislature had delegated to the Governor of this State the powers that it has delegated in the Schackno Bill to the President of the United States in reference to intrastate commerce in the same form that it made that delegation to the President of the United States, I do not believe that such delegation would be sustained as being within the power of the Legislature, in the absence of the setting up of a standard of fair competition, leaving only to the Governor or any other state body or agency the power to make rules to carry into execution the powers delegated.

In the Code of Fair Competition for the Petroleum Industry, at Rule 4 of Article V thereof, there is set up a standard of fair competition, as hereinbefore noted. Here is an attempt to set up a standard of fair competition, and an agency is created with the power to establish regulations to carry into effect the law designed to maintain such a standard; and, under the present circumstances, it may well be that the legislation by the State Legislature to the same effect, set forth in the act, would be sustained as a proper exercise of legislative power and not an unauthorized delegation of legislative power,—subject, however, as to its actual operation in any particular case, to the limitations of the State Constitution and of the Fourteenth Amendment to the Constitution of the United States.

We have heretofore considered the Schackno Bill upon its merits. There is in the State Constitution a provision which expressly denies to the Legislature the power to legislate by reference. Article III, §17 of this Constitution provides:

'No act shall be passed which shall provide that any existing law, or any part thereof, shall

be made or deemed a part of said act, or which shall enact that any existing law, or part thereof, shall be applicable, except by inserting it in such act.'

This provision has been for many years in the Constitution of this State. The evils sought to be avoided by it are well set forth in the case of *The People ex rel. Commissioners* v. *Banks*, 67 N. Y. 568. I am of the opinion that this provision is effective to cover an act of Congress or the Codes adopted in pursuance thereof. The Codes, once approved, are designed to have the effect of law. The State Legislature, by this section, is prohibited from legislating in the manner in which it has legislated in Chapter 781 of the Laws of 1933, in so far as it attempts to provide that the National Industrial Recovery Act shall be the law of this State by mere reference to the Act; and this of course applies to the Codes adopted thereunder. The National Industrial Recovery Act was an existing law, to be sure, of Congress; but if the Legislature is prohibited from making an existing law of the State a part of an act, by mere reference, how much more should the provision apply to an existing law of the United States or of any other State in the Union? And this would apply alike to Codes adopted in pursuance of an existing Federal Law. For this reason, if for no other, the Schackno Act, in so far as it incorporates by reference the National Industrial Recovery Act and makes it, by mere reference, a part of the Schackno Act, is void, in that it constitutes an attempt to legislate in a manner prohibited by §17 of Article III of the State Constitution. *And this principle with greater force would apply to legislation which would incorporate as a part of the law of the State of New York any future law which Congress might enact or which any agency named by Congress*

might in the future promulgate in the form of a Code.

Therefore, so far as the plaintiff bases any right upon the so-called Schackno Bill, (Chapter 781, Laws of 1933) the complaint must fall." (Italics the writer's.)

The latter case is comparatively similar to the case at bar, and the Court clearly upholds the contentions of the appellant respectfully urged herein.

The State of California (in *People of State of California* v. *Capital Cleaners & Dyers*, Superior Court of the State of California, County of Los Angeles) held that part of the California Industrial Recovery act, providing that national codes are to supersede state laws upon approval, was invalid, because of the unwarranted delegation of legislative power. The Court said in part:

"The legislature, if so minded, may adopt by reference an existing statute of some other state or of the United States, and such adopted statute becomes effective as a part of the adopting statute, and probably the same rule would apply to any existing administrative regulation or draft of a code, or body of law purporting to deal with the subject of legislation, even though never enacted by any legislative body; *but here the legislature has attempted to adopt prospectively codes not in existence and whose terms were necessarily unknown when it passed the statute.* The regulations contained in the code now under consideration, while possibly within the letter of the very general language of reference contained in the California statute, relate to a considerable number of subjects which, have heretofore been highly controversial as to the necessity, propriety and constitutionality of public regulation in regard thereto. Not only is

there an entire absence in the statute of any legislative approval of the particular regulations made by the code on these subjects, but there is no declaration of the necessity or propriety of any regulation whatever on any of these subjects and no indication that the legislative mind was turned to them all. We think the provision of this statute purporting to adopt these future codes is an unwarranted delegation of legislative power. The legislature may delegate the power to determine some fact or state of things upon which the law makes or intends to make its own action depend, but the provisions of the national code which plaintiff seeks to enforce in this action are much more than such a determination. As applied to the present subject-matter, the statute was practically an abdication of its functions by the legislature. It amounted to an attempt to delegate to others 'its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful', and this it had no power to do. *In re Peppers*, 189 Cal. 682; *In re McLain*, 190 Cal. 376, 381; *People* v. *Parks*, 58 Cal. 624, 643; *Schaezlein* v. *Cabaniss*, 135 Cal. 466, 470; *Englebretsen* v. *Industrial Acc. Comm.*, 170 Cal. 793, 797; *Ex parte Cox*, 63 Cal. 21. In the matter of prices to be charged, the legislature has not even attempted to adopt the schedule set up in the complaint. The reference in the statute runs only to the national code, not to the acts of subordinate agencies which may be set up under it." (Italics ours.)

On January 28, 1935, subsequent to the decision rendered in the case at bar, the Circuit Court of Appeals (Lucas County, Ohio), was called upon to determine the validity of the Ohio Industrial Recovery Act and the question of delegation of power thereunder.

Adhering to the opinion of this Court in the case of *Amazon Petroleum Corp.* v. *Ryan et al.*, 260, January 7, 1925, it declared the said State Act unconstitutional as an unwarranted delegation of legislative power. This Ohio State Act is practically similar to the provisions of Chapter 781 of the Laws of 1933 of the State of New York. The short opinion follows:

> "CROW, *J.* This case, which is here on appeal, originated in the common pleas court of Lucas County, Ohio, by petition wherein the State of Ohio on relation of the Prosecuting Attorney of said County sought an injunction against a retail dealer in coal in Toledo, Ohio, to prevent violation of a code adopted pursuant to the act at page 603 and following, 115 Ohio Laws, which we will refer to as the Ohio Act.
>
> On the trial in this court defendant conceded that he had not complied with certain requirements of the code, namely: that he had not contributed to the expenses of its administration; that he had not made any report pursuant thereto, and that he made and would continue to make sales below the code prices.
>
> There was no evidence tending to prove that he in any manner participated in or encouraged the formulation or establishment of the code, nor did he in any way consent thereto.
>
> Provisions of some of the codes adopted in Ohio pursuant to the statutes we have referred to, have come before courts of common pleas of the State with the result of discord concerning fundamentals, but neither the Supreme Court, nor any of the Courts of Appeals of Ohio has decided any of the many questions raisable in relation to any of the codes adopted under the act.
>
> Without treating any of the decisions of the common please courts, we hold that the decision of

the Supreme Court of the United States, January 7, 1935, in the case of *Amazon Petroleum Corp.* v. *Ryan et al.*, No. 260, and the reasoning of the opinion of the eminent Chief Justice, are decisive of the case we have here.

The Ohio act under which the code was established with which defendant has not complied in the particulars we have alluded to, possesses in essence the identical infirmities found by the Supreme Court of the United States in the Federal statute which was the subject of controversy in the case cited.

We could not, were we inclined to so undertake, add to or take from the reasoning of the opinion of the learned Chief Justice, for, as would have been expected from him, the reasoning is perfect.

Therefore, without further words, we find that as to the matters requiring decision in the case at bar, the provisions of the Ohio act under which the code in issue arose, are invalid in that the act in its relation to such matters is an unwarranted delegation of legislative power to an administrative officer, the Governor of the State and to other persons sought to be authorized with him to formulate codes.

The finding and judgment will therefore be for the defendant at the costs of plaintiff.

Since the foregoing was written, there has come to our knowledge the decision of the Court of Appeals of Hamilton County, Ohio, in the case of *Riesenberg* v. *Divisional Code Authority, etc., et al.*, which perpetually enjoined defendants from taking steps to determine the reasonable cost of retailing solid fuel in so far as it affected plaintiff, and from attempting to prevent the sale of solid fuel by him below the cost determined by defendants, on the ground that defendant Divisional Code Authority No. 23 Retail Solid Fuel Industry had not been granted authority by the Ohio Act to determine the

lowest reasonable cost of retailing solid fuel or to prevent the sale of solid fuel under said cost as determined, the court having found that plaintiff had not signed the code of fair competition of the Retail Solid Fuel Industry.

No opinion was filed in the case, but it is clear that the court decided the Ohio Act ineffectual to authorize the prevention of the sale of coal under the cost fixed by the code. To that extent the decision was in accordance with our holding in the instant case. We understand that case to be now pending in the Supreme Court of Ohio.

In the case at bar a judgment and decree will be rendered for the defendant and the petition dismissed.

Judgment and decree for defendant."

The foregoing opinion is quoted from *State of Ohio ex rel. Frazier Reams, Prosecuting Attorney, Lucas County* v. *Edward Dusha,* doing business as City Coal Company, Court of Appeals, Lucas County, Ohio, No. 3003, January 28, 1935. (Not officially reported yet.)

Relying upon this latter decision of the Circuit Court of Appeals, we find still another lower court decision of Ohio declaring the Ohio Industrial Recovery Act unconstitutional. The opinion reads, in part, as follows:

LEACH, *J.*:

"On Motion for Temporary Injunction.

In view of the decision of the Court of Appeals of Lucas County announced on Jan. 28, 1935, reversing the decision of the Common Pleas Court of that County in the case of *State, ex rel. Reams* v. *Edward Dusha, etc.,* numbered in the Common Pleas Court 140, 434, in which the Court of Appeals holds H. B. 705, 115 O. L. 603, to be an unwarranted and unconstitutional delegation of legislative

power, which decision is (with the exception of the decision of the Hamilton County Court of Appeals affirming the decision of Judge Mack, hereinafter referred to), the first decision of one of the higher Courts of this State on the subject matter, and as said decision is in harmony with the rule which has long obtained in this State, being announced in *C. W. & Z. R. R. Co.* v. *Comm'rs of Clinton County,* 1 Ohio State 77, and also in *Harmon* v. *State,* 66 Ohio St. 249, as well as in line with and directly based on the principles decided and reaffirmed in *Panama Refining Co. et al.* v. *A. D. Ryan* ('Hot Oil' Case) decided by the Supreme Court of the United States, on Jan. 7, 1935, this Court is of opinion that those parts of the act, H. B. 705, 115 O. L. 603, involved in this case are an unlawful and unconstitutional delegation of legislative power. See to same effect, *United* v. *Kinnebrew Motor Co.,* 8 Fed. Supp. 535; *Hart Coal Corp.* v. *Sparks,* 7 Fed. Supp. at page 28.

This Court is of opinion that even waiving the foregoing for the purposes of this case that the Act itself does not purport on its face to authorize the so-called Code Authorities to fix the prices at which used automobiles may be taken in by a new car dealer. The most that the Act can be held to authorize is to adopt codes against 'unfair competition'. 'Unfair Competition' is not defined in the Act. It must, therefore, be held now to have the same meaning as had theretofore been given to it prior to the passage of the Act. As pointed out by Matthews, *Judge,* in *State ex rel. Schneider* v. *Laundry Co.,* 32 Ohio Nisi Prius (N. S.) at page 138:

> 'Unfair Competition does not include price cutting or any other method of acquiring trade that does not involve deception of the public, or an infringement of the rights of the competitor

* * *. The Legislature must be presumed to have known of this judicial definition of unfair competition when it enacted House Bill No. 705.'

See also *Federal Trade Commission* v. *Gratz*, 253 U. S. 421 at 427. *Sears, Roebuck & Company* v. *Federal Trade Comm.*, 258 Fed. 307.

The foregoing was approved by Alfred Mack, *J.*, in the case of *State, ex rel. Schneider* v. *Ben Reisenberg*, Court of Common Pleas of Hamilton County, No. A-45544.

There is no showing made by the evidence in this case that the price as shown in the book published by the National Automobile Dealers Association for the Series B Wolverine, Model alleged to have been taken in at a price higher than the price fixed by the N. A. D. A. book was fixed as the Code itself provides, assuming the validity of the Code and assuming the National Automobile Dealers Association, a trade association incorporated under the laws of Illinois and having its principal office at No. 1010 Pine St., St. Louis, Mo., and not being a citizen of, or organized in Ohio, can properly be made the repository of powers or authority granted by the Legislature of Ohio." (*State, ex rel., D. J. Hoskins, etc.* v. *Farber Motor Sales, Inc.*, Court of Common Pleas of Franklin County, Ohio, No. 143,980, decision rendered on the day of February, 1935, as yet unofficially reported.)

For an elaborate opinion which was relied on by the Court in *Hoskins* v. *Farber Motor Sales Co. Inc.*, just cited, we respectfully refer this Court to the case of *State of Ohio* v. *Gullatt Cleaning & Garment Co., supra*, and *State ex rel. Schneider* v. *Laundry Co.*, 32 Ohio Nisi Prius (N. S.) at page 138.

We have respectfully referred to some lower court decisions involving the constitutionality of State Acts to

wit: The Industrial Recovery Acts of the States of California, Ohio, New Jersey and New York as expressive of the trend of judicial opinion thereon in view of the fact that this Court has not, but for the case at bar, been called upon to determine the constitutionality of the various State Industrial Recovery Acts.

The reasoning of the foregoing cases exposes the rationale of the Constitutional provisions of the State of New York.

The Assembly and the Senate are vested with the authority of legislative power in this State (Article III, Sec. 1, New York State Constitution), and by Article III, Section 17, it is the expressed will of the State that that power may not be delegated to any other body or instrumentality.

The Legislature cannot secure relief from its duties or responsibilities by a general delegation of legislative power to someone else.

People v. *Grant*, 242 App. Div. 310;
People v. *Tremaine*, 252 N. Y. 27, 44.

The arguments heretofore asserted in Point I of this brief under the topic of "Delegation of Legislative Power", are applicable even with more force to the New York State Act than it is to the National Industrial Recovery Act. We therefore respectfully incorporate the authorities and contentions heretofore expressed as applicable to the New York State Recovery Act.

If there is any doubt with respect to the fact that Congress, in the enactment of the National Industrial Recovery Act, delegated its legislative functions to the President of the United States, and by him re-delegated to his agents, boards and so-called code authorities, *there can be no doubt* but that the Legislature of the State of New York, by Chapter 781, divests itself of all power, whether it be administrative or legislative.

The power to enact the Codes is delegated by the State Legislature *not to its own authorities,* but to the national authorities, and by them in turn, to the respective persons and associations who in fact enact the codes.

It has never been contemplated under any constitutional form of government, to permit the enactment of penal statutes to others than the Legislature. Of course, if the Legislature itself enacted the particular provisions of the Code in the fashion in which it enacted the Milk Control Law (*People* v. *Nebbia,* 291 U. S. 502), a different situation would then be existant.

A particular code of law enacted into the penal statutes of a State, must necessarily be scrutinized by the various legislative committees, and public hearings had thereon, as well as discussions, debates, and actual vote thereon, in the open Assembly or Senate.

The Code of Fair Competition for the Motor Vehicle Retailing Trade became the law of the State of New York not by the will of the Legislature of this State, not after hearing, discussion, and vote, but solely by virtue of the certified copy thereof which was filed with the Secretary of State of New York. Suffice it to say, that when Chapter 781 was enacted, *the Code was not yet in existence,* and did not come *into being until three months thereafter.* Obviously, the Legislature of the State of New York is ignorant of its contents, despite the fact that a violation thereof puts one in the category of a criminal. How shocking it is indeed to a citizen of the State of New York to be dragged into a Criminal Court and charged with a crime bearing the severe penalties of fine and imprisonment upon a penal statute never in fact enacted by the citizen's own elected representatives.

No greater deprivation of life, liberty and property guaranteed to a citizen under the Fourteenth Amendment, can possibly be shown than that which is exemplified by the form and substance of the Statute, Chapter 781 of the

Laws of 1933. To paraphrase the language of one of New Jersey's prime Chancellors, this is indeed "vicious legislation".

We may adopt the spirit, but we may not make the law by injecting into our statutes a reference to the United States Code, or Minnesota law or Japanase law, by merely calling it our law. The Legislature must establish its own standards and laws; it cannot draft others, it must enact them.

To permit the appellee to prosecute the appellant for an alleged violation of Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade, said prosecution being based upon the provisions of Chapter 781 of the Laws of 1933, would be to deprive the appellant of its liberty and property without due process of law, and in manifest derogation of the protective safeguards of the Fourteenth Amendment.

POINT IV.

Article IV of the Code of Fair Competition for the Motor Vehicle Retailing Trade with respect to the provisions prohibiting the granting of an allowance on a traded in automobile, in excess of the arbitrary figure established in the so-called "Official Guide Book", is invalid and void in that it abridges the freedom of contract and deprives the complainant of its liberty and property without due process of law, in derogation of the Fourteenth Amendment to the Constitution.

The Code of Fair Competition for the Motor Vehicle Retailing Trade secures its life basically from two legislative acts and one executive act. The two legislative acts are the National Industrial Recovery Act, and Chapter 781

of the Laws of 1933 of the State of New York commonly known as the New York State Industrial Recovery Act. The executive act is the Presidential sanction and approval of the Code of Fair Competition for the Motor Vehicle Retailing Trade.

We have heretofore discussed the legalistic defects of these respective legislative and executive acts in detail. If any of such acts, be they legislative or executive, are found to be in contravention of basic constitutional mandates, then it follows that the enforcement of any of the provisions of this Code of Fair Competition in the State of New York against the appellant, would effectually deprive the appellant of its liberty and property without due process of law.

It is here necessary to point out the fundamental distinction between the constitutionality of the respective Recovery Acts as distinguished from the constitutionality of the Code itself or any of the particular provisions thereof, promulgated thereunder. If it can at all be held that the Recovery Act is constitutional, this would not of itself, justify or sanction the formulation and adoption of Codes which contain provisions violating the due process clause—the Fourteenth Amendment. This fundamental distinction is tersely summed up in the following article taken from the Minnesota Law Review of February, 1934:

> "Mention should be made of the confusion which is present in current discussion of the constitutionality of the Recovery Act, arising as it does out of an assumption that because a code may contain something which is unconstitutional the recovery act itself is invalid. The act is not to be judged by the codes or agreements formulated under it. Codes may be formulated which are not authorized by the statute. The statute will not be unconstitutional merely because those who administer it fail to fol-

low it. The code provisions may in some instances be illegal, or they may be unconstitutional, but the recovery act is to be judged on its own merits, on what it authorizes to be done, and not upon what is done in its name. Many questions of statutory interpretation and administrative law doubtless will come before the courts because of the act, but these are to be distinguished from questions of the constitutionality of the act itself. Due process imposes a standard of reasonableness not only upon the act itself, but also upon the administrative actions taken in pursuance of it. Actions taken must be reasonable, and if the act does not fix any standard the due process clause does so, and the courts will apply that standard. But if the act fixed a standard which is reasonable, and the administrators fix an unreasonable standard, it is the administrative action which is invalid, not the statute."

These observations are significant for they correctly indicate that the particular provisions of the Code of Fair Competition for the Motor Vehicle Retailing Trade attacked herein, may be held unconstitutional without necessarily invalidating the entire Recovery Act.

We respectfully submit as our first proposition herein that Article IV (R. 23, 24, 25), Subdivision A, Paragraphs 1, 2, 3 and 4 thereof, is unconstitutional when scrutinized under constitutional tests.

The right of a merchant to buy and sell the products of his trade (in the case at bar automobiles) and to contract about his affairs, is a part of the liberty of the individual protected by the Fifth and Fourteenth Amendments, and settled by a long line of decisions.

Adkins v. *Children's Hospital* (1923), 261 U. S. 525, 67 L. Ed. 785;

Tyson & Bros. v. *Banton* (1926), 273 U. S. 418, 71 L. Ed. 718;

Fairmont Creamery Co. v. *Minnesota* (1927), 274 U. S. 1, 71 L. Ed. 893;
New State Ice Company v. *Liebmann* (1932), 285 U. S. 262, 76 L. Ed. 747;
Wolff Packing Co. v. *Court of Industrial Relations* (1923), 262 U. S. 522, 67 L. Ed. 1103;
McFarland v. *American Sugar Co.* (1916), 241 U. S. 79;
Ribnik v. *McBride* (1928), 277 U. S. 350;
U. S. v. *Trenton Potteries Co.*, 273 U. S. 392;
Williams v. *Standard Oil Co.*, 278 U. S. 418;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Sterling v. *Constantin*, 287 U. S. 378.

The right to deal, to sell, or trade the products of one's labor or services, is property, and subject to the protection of the Fourteenth Amendment (cases *supra*).

Under the foregoing authorities, the provisions of Article IV of the Code attacked, must be declared to be unconstitutional for the said provisions violently collide with the safeguards of the Fourteenth Amendment and the holdings of this Court (*supra*).

No doubt the appellee will urge before this Court as authority for upholding the provisions of Article IV of the Code of Fair Competition, under attack, the decision of this Court in *People* v. *Nebbia*, 291 U. S. 502. We shall hereinafter show that the provisions of Article IV of this Code, when tested by the rule laid down by this Court in *People* v. *Nebbia*, are found to be unreasonable, arbitrary and capricious. The succinct rule stated by this Court in the said case, is as follows:

> "The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects State action,

> do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. *And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts.*" (Italics ours.)

and further:

> "• • • *Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.*" (Italics ours.)

Economic liberty rests upon the right of private contract, and the essence of all private contract and the normal course of business conduct, is price. It has always been the general aim of both our Federal and State Governments to preserve and enlarge individual opportunity and to stimulate private initiative by permitting price freedom. From time immemorial, it has been held that "freedom is the general rule and restraint the exception" (*Adkins* v. *Children's Hospital, supra*). Public policy has been to protect freedom of contract in industry and to condemn any attempt of impairment and possible destruction of such freedom by monopoly.

Under certain circumstances, there has been a digression from this avowed policy for the protection of the health,

morals, and general welfare of the community under the sanction of police power.

Under the guidance of the aforementioned principles, the relevant facts in the case at bar, reveal:

Today, practically all new automobiles are sold through the automobile dealer. The automobile dealer is a merchant operating under "an agency" contract with a manufacturer of automobiles wherein the said dealer agrees to purchase from the manufacturer a given quantity of automobiles at a given price and to retail the same subject to certain general directions of sale and service established by the manufacturer.

These dealers sell these new automobiles upon one of two bases. The first is an outright sale of an automobile for a stated consideration. This consideration may be either paid in cash or amortized over a period of time (conditional sale). The second method of sale is one where the purchase price is paid for in part by the exchange and delivery to the dealer of an old automobile for an agreed price, the balance of the consideration being paid for in cash or amortized over a period of time. The latter method is commonly known as a "trade-in" sale and constitutes more than 85% of all sales made of new cars.

Prior to the adoption of Article IV, Subdivision A, of the Code of Fair Competition herein, automobile dealers were in no wise restrained from ascertaining and allowing upon trade-ins, such values as they, in their discretion, determined. The determination of course, was based upon market conditions, the economic law of supply and demand, the particular manufacture of the particular car, its then condition, age, model, style and year. In other words, the dealer was only subject to the effects of normal competitive conditions amongst his fellow dealers and free to contract for a trade-in in accordance therewith. Obvi-

ously, the automobile dealer was in the same category in his particular trade as all other businesses are in their particular fields.

As we have heretofore shown, unless tainted with fraud or deception, such competition has never been deemed to be unfair (Point II of this Brief).

By the provisions of Article IV, Subdivision A thereof, a plan is evolved which prohibits the dealer, under severe penalty of fine and imprisonment, from allowing to prospective purchasers a value upon a trade-in in excess of the arbitrary maximum allowance figure arrived at in the "Official Guide Book" promulgated under the provisions of Article IV.

Article IV, Subdivision A, provides in part as follows:

> "(1) That the value of any model of used motor vehicle, either passenger or commercial, shall be the average price that the public in any given market area is then paying for such vehicle, as ascertained by the Association from sworn statements of all actual retail sales to consumers, subject to the approval of the Administrator. The Association shall publish the average prices thus ascertained approximately every 60 days. In order to insure fair average value in the interest of the consumer, published averages shall be computed for the preceding period and there shall not be included in computing such average that 20% of sales which represented the lowest sales of all actual sales reported in the previous period.
>
> (2) That no dealer shall, directly or indirectly, or by subterfuge, accept in trade any used vehicle at an allowance price of more than its value as ascertained in paragraph (1) above, less a minimum selling, handling, and reconditioning charge, according to the following schedule:
>
> (a) Five percent of the allowance price as de-

termined in paragraph (1) above, on (x) the current series model or (y) the preceding series model.

(b) Ten percent of the allowance price as determined in paragraph (1) above on the model preceding, the two models described in paragraph (2) sub-section (a) above, namely (x) and (y).

(c) Fifteen percent of the allowance price as determined in paragraph (1) above, on all models other than the three models described in sub-sections (a) and (b) above.

(3) To provide a record for the establishment of used car allowances in paragraph (1) above, there shall be provided in each logical trading area of the United States an Official Guide, which shall be provided by the Association which shall be known as the Association Official Guide and shall be recognized as the authority for such allowances, and which shall be based upon actual sales in each trading area for the period of approximately sixty days preceding the date on which the compilation of the official guide is started, as hereinabove provided.

(4) There shall be used as a basis of establishing allowance values as provided in paragraphs (1) and (2) above, the principle of averaging actual sales at retail to consumer for the preceding period. Since this will, in isolated instances, by reason of very few or no sales on particular models, leave a need to establish a guide figure on such models, the following method of determining the allowance values will be pursued for the public protection, namely:

(a) If any model of motor vehicle described in the Official Guide shows five or more sales at retail to consumer within the district in any period, then the *average* figure published becomes the maximum allowance for the ensuing period."

In Subdivision B of Article IV, it is provided in part that no dealer sell a new car at retail to a consumer for less than the factory list prices, plus contemplated fixed charges for additional equipment, taxes, transportation and the cost of handling.

It is to be particularly noted that a maximum allowance figure is established through a process of *averages, i. e.,* the *average* is the maximum. This average maximum figure *per se,* is arbitrary and capricious for it serves to deny to approximately one-half of all purchasers trading in automobiles, a fair and true value for their used automobile so offered. The average, to be a true average, must contemplate a given number of units below the average and a given number of units above the average. Such is the normal computation of an average. It is immediately obvious and apparent that to prohibit an allowance in excess of the maximum average so established, is to deny to the purchasers whose automobiles are worth more than the average, a fair and actual value for their trade-ins. As a practical matter, it places a premium upon prudent, careful handling of an automobile, because the prospective purchaser who has carefully preserved his automobile is prohibited from receiving its true value on a trade-in and can only in fact realize but the "average" established.

The automobile dealer is in no wise restrained from allowing to a prospective purchaser the fair value of an automobile if perchance the old automobile comes within the *lower* bracket of the figures used in the determination of the average. In other words, a car worth less than the average, can be traded in at a fair and actual value for it is worth less than the maximum established and therefore the dealer will not offer more than the maximum for the said car.

With respect to the car worth the average, obviously the maximum average will be allowed. It is apparent, therefore, from the mere contemplation of the word "aver-

age"; that it serves to deny to the prospective purchaser whose car is worth more than the average, the actual and fair value of his traded in automobile.

As to the cars lower than the average, or at the average, the provisions of Article IV are useless and baseless, for in such event a prospective purchaser receives the actual value of his car.

Such provisions which deny to a prospective purchaser the actual trade-in value of his automobile, if the said automobile is above the average, is obviously unreasonable, arbitrary and capricious. It serves to abridge the freedom of contract between the dealer and the purchaser for the dealer is prohibited from contracting with a prospective purchaser to allow him a fair and actual value of his car although that value be more than maximum average arrived at in the Official Guide Book.

It serves further to deny to a prospective purchaser whose car is above the average, the equal protection of the law for he may not receive the actual and fair value of his traded in automobile whereas the purchaser whose car is worth less than the average or the average, may contract to receive the actual and fair value thereof.

As a practical matter, this arbitrary standard serves to defeat the alleged purposes of the National Industrial Recovery Act. The prospective purchaser whose car is worth more than the average, seeking to purchase a new automobile, is compelled to take one of three courses. First, accept the arbitrary average established. This would deny to such a purchaser the fair and true value for his trade-in, and would create for the dealer a double profit, a profit that he had never theretofore enjoyed. The dealer would not only make a profit upon the sale of a new automobile, but upon a resale of the trade-in, he could realize the true value of the trade-in because no restraint exists upon the outright sale of the used car as such. Second, if the prospective purchaser did not desire to be victimized by such

a capricious standard, he could then abstain from purchasing. This is the normal reaction of a person in any trade who is refused a fair consideration upon any sale. That this actually happened in a great number of cases, cannot be denied, for immediately after the adoption of the Code, a sharp reduction in the purchase of new automobiles ensued (R. 165, 166).

It is most significant to note that despite the general improvement of industrial conditions throughout the Nation, the volume of new car sales in the Metropolitan area of New York, has fallen approximately 40% upon the immediate adoption of the Code.

We need not burden this Court in this brief with the effect of the provisions of Article IV, Subdivision A, but respectfully refer this Court to the Affidavit of David B. Spielman, for a complete review (R. 140, 37).

A sharp reduction in the volume of sales necessarily results in a sharp reduction in employment and the eventual frustration of the purposes of the National Industrial Recovery Act with respect to the automobile industry and the kindred trades dependent thereon.

The third course that a prospective purchaser followed was to seek out some dealer who was willing to assume the jeopardy of violating the provisions of Article IV, having the apparent sanction of law, so that there might be a fair and honest exchange of values. Somewhat paradoxically—law abiding citizens conspired to evade the law in order that there might be an honest exchange of values.

At the outset of Code enforcement, violation thereof was not rife but as the inequality of the arbitrary standard created justification in the mind of man—the prospective purchaser—we find violation gaining in momentum, until today violation is the rule and adherence the exception.

Such arbitrary standard created by this average further served to undermine the equilibrium of the trade with respect to those prospective purchasers who possessed trade-

ins worth less than the average. The Official Guide Book figures became greatly publicized so that even those prospective purchasers with old automobiles worth less than the average, sought in many instances, to secure the maximum that the law permitted. They travelled from dealer to dealer until one was found who was so eager and zealous to obtain a share of "legitimate" business that he consummated a trade at the maximum Guide Book figure.

We respectfully submit that "this is not regulation, but management, control, dictation—it amounts to the deprivation of the fundamental right which one has to conduct his own affairs honestly and along customary lines" (*People* v. *Nebbia, supra,* dissenting opinion).

To sustain the argument of the defendant herein "would support general prescription of prices, for farm products, groceries, shoes, clothing, all the necessities of modern civilization, as well as labor, when some Legislature finds and declares such action advisable and for the public good. This Court has declared that a state may not by legislative fiat, convert a private business into a public utility (*Michigan Comm.* v. *Duke*, 266 U. S. 570; *Frost Trucking Co.* v. *R. R. Comm.*, 271 U. S. 583; *Smith* v. *Cahoon*, 283 U. S. 553). And if it be now ruled that one dedicates his property to public use whenever he embarks upon an enterprise which the Legislature may think it desirable to bring under control, this is but to declare that rights guaranteed by the Constitution exist only so long as supposed public interest does not require their extinction. To adopt such a view, of course, would put an end to liberty under the Constitution" (*People* v. *Nebbia, supra,* dissenting opinion).

The formula that Courts have employed is that only the price of those industries which are affected with a public interest may be regulated. *It is respectfully submitted that the retail automobile industry bears no such relation to*

the public as to warrant its inclusion in the category of business charged with the public use, and as such may not be regulated.

Undeniable support of the contention of the appellant that its business is not such as is vested with a public interest or "a public use" is found in two cases hereinabove referred to.

In the *New State Ice Company* case, *supra*, the validity of an Oklahoma statute which, in substance, compelled an ice dealer to procure a certificate of public convenience and necessity as a condition precedent to dealing in ice, was invalid. This Court in that case held the statute void under the Fourteenth Amendment. The prevailing opinion of Mr. Justice Sutherland reads in part:

> "Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use."

The *New State Ice Company* case was reviewed as recently as 1932.

In the *Wolff Packing Co.* case, *supra*, this Court held invalid a statute purporting to declare that the meat packing business was one "affected with a public interest" and thus to permit fixing wages. The opinion of Chief Justice Taft, in part, says:

> "It has never been supposed, since the adoption

of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest *that theories of his product or his wages could be fixed by state regulation.*" (Italics ours.)

and further says:

"• • • the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.

"In the preparation of food, the changed conditions have greatly increased the capacity for treating the raw product, and transferred the work from the shop with few employees to the great plant with many. Such regulation of it as there has been, has been directed toward the health of the workers in congested masses, or has consisted of inspection and supervision with a view to the health of the public. But never has regulation of food preparation been extended to fixing wages or the prices to the public, as in the cases cited above, where fear of monopoly prompted, and was held to justify, regulation of rates. There is no monopoly in the preparation of foods. The prices charged by plaintiff in error are, it is conceded, fixed by competition throughout the country at large."

In the *Fairmont Creamery Co.* case, *supra*, the statute involved undertook to require every buyer to adhere to a uniform price fixed by a single transaction. *This Court decided that such legislation in the fixation of price was a clear infringement of private rights.*

In the *Adkins* case, *supra*, a board of three was given the power to fix minimum wages for women and children. The Court held the statute violative of the Due Process

Clause of the Fifth Amendment. The prevailing opinion says (p. 558):

> "In principle there can be no difference between the case of selling labor and *selling goods.* • • • Should a statute undertake to vest in a commission power to determine the quantity of food necessary for individual support, and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed." (Italics ours.)

The retail automobile industry inherently and unquestionably is a private business and as such may not be converted into public business by legislative fiat.

> *Producers' Transp. Co.* v. *Railroad Comm. of California,* 251 U. S. 228, 230, 40 S. Ct. 131, 64 L. Ed. 239;
>
> *People ex rel. Durham Realty Corp.* v. *LaFetra,* 230 N. Y. 429, 442, 130 N. E. 601, 16 A. L. R. 152.

The extraordinary feature of the present price fixing provisions that declare an ordinary individual to be guilty of a crime with a drastic remedy of fine or complete annihilation of his business through licensing power granted to the President, all because a retail storekeeper insists upon his property right to contract at a price satisfactory to himself and his customers is a most unreasonable and oppressive deprivation of the inherent rights of an individual. The Federal and State Constitutions are not things merely to be extolled in academic halls or be the subject of juvenile orations, but are vibrant and designed to safeguard not only life and liberty but also property rights in times of stress and suffering when despairing and

desperate majorities seek by forbidden methods the subversion of fundamental principles of Government.

If the effort manifested by this Code to regulate private conduct by fixation of prices of a private business which cannot conceivably be vested with a public interest, be sustained then the extension of similar statutes to every trade and every occupation to illimitable bounds can reasonably be expected.

This Court in the *New State Ice Company* case, *supra*, forcefully expounds the position of the defendants in the case at bar, when it says (p. 278):

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, 'under the guise of protecting the public, arbitrarily (to) interfere with private business or prohibit lawful occupations, or impose unreasonable and unnecessary restrictions upon them.' (*Burns Baking Co.* v. *Bryan*, 264 U. S. 504, 513, and authorities cited; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113."

We respectfully submit that upon any theory, either under the decisions of this Court decided prior to *People* v. *Nebbia*, and even in accord with *People* v. *Nebbia*, the provisions of Article IV discussed herein, must be deemed unconstitutional.

Article IV, Subdivision B, Sections 1 and 2, read as follows:

> "B. MARKETING RULES
>
> "The following Marketing Rules shall take effect 30 days after the approval by the President.

(1) No dealer shall sell a new car at retail to a customer for less than factory list prices, plus an amount equal to——

(a) Equipment at listed prices.

(b) All taxes paid by dealer applicable to the motor vehicle sold.

(c) Average cost of transportation from factory of said dealer or shipments received by said dealer during a 60 day period as shown by sworn statement of said dealer.

(d) Dealer's actual cost of handling (including such items as (w) unloading, (x) assembling, (y) conditioning for delivery, and (z) interest actually paid by said dealer, but not to exceed 90 days on cost of transportation).

The only exceptions to these prices shall be sales to proprietors' immediate families or members of his organization when for the personal use of such buyer. Motor vehicles sold to employees for use in their employer's business as demonstrators or executives' cars, and cars used as demonstrators by dealer, must be so registered with their trade association, or with the State Advisory Committee; demonstrators' and executive cars shall not be sold to a consumer at retail for less than the full retail price except when they have been in use for a period of at least 60 days from the date of registration, as aforesaid, and have had at least 3,500 miles actual road usage, or when the manufacturers have made public announcement of a change in model:

(2) No dealer or representative shall offer or give any discount, gratuity, commission, service, or accessory, to a customer or his agent, for the purpose of inducing the customer or his agent to purchase a car. Nothing herein shall prevent conduct pursuant to any warranty of the manufacturer."

In accordance with the foregoing provisions of Article IV, to deny the right to a motor vehicle retail dealer to allow a prospective purchaser an actual and fair trade-in value on his automobile, though the said value be in excess of the Official Guide Book figure, is to effectually fix the price of the new car purchased, for, under the provisions quoted, a dealer is prohibited from selling an automobile at less than factory list price, plus certain additional charges. The dealer is thereby deprived of the competitive lever when consummating a sale of a new automobile on the trade-in plan. The dealer is "straight-jacketed", by being prohibited from selling a new car below the factory list price and being prohibited from allowing a trade-in value at more than the maximum average, if the car is actually worth more than the said maximum figure, and thereby all competitive means are removed from the automobile dealer. He is left straddled and hamstrung by the provisions of this Code.

As we have heretofore pointed out, the essential aim of Government has been to preserve and enlarge individual opportunity and to stimulate private initiative by promoting price freedom. Under the National Industrial Recovery Act, we have sought to improve competitive conditions, but not to eliminate them. The competitive system is the only economic system consonant with the spirit of Democratic institutions.

The most specious plea advanced for price control is that it is needed and required to meet the Code minimum wage requirement. If A and B pay the same wages, neither A nor B needs special price protection because the increase in labor costs, if properly enforced, applies to the whole industry. If they represent the marginal fringe of industry and cannot exist without price protection, it is not sound public policy to support such groups.

There is no reason why an entire industry should be

hamstrung to protect this marginal fringe from the cost burdens of the minimum wages of the Codes.

Under a long series of decisions rendered throughout the land, the provisions of Article IV, Subdivision B, subsection 2, have been declared invalid and unconstitutional as an unlawful interference with liberty and permitting a deprivation of property without due process of law. The provisions referred to prohibit a dealer from giving any so-called "commission, gratuity, discount, service or accessory, to a customer or his agent, for the purpose of inducing the customer to purchase a car".

There is nothing inherently unfair in such competitive means and neither is there any substantial relation between the giving of such commission, gratuity, etc., to a proper governmental end.

Innumerable cases have held that the practice of giving premiums for the purpose of inducing the purchase of merchandise is not unlawful, and the attempt to restrict such practice has been declared to be unconstitutional. The extent of the practice is indicated by the number of judicial decisions to the effect that statutes prohibiting the use of trading stamps on merchandise, amount to an unconstitutional interference with liberty and permit a deprivation of property without due process of law.

Some of the cases to this effect are as follows:

State v. *Hawkins*, 95 Md. 133, 144;
State v. *Caspare*, 115 Md. 7;
City & County of Denver v. *United States Stores Co.*, 189 Pac. 848; 68 Colo. 363 (1920);
United Cigar Stores Co. v. *People*, 190 Pac. 1117; 68 Colo. 546 (1920);
Opinion of Justices, 115 N. E. 978; 226 Mass. 613 (1917);
Commonwealth v. *Sisson*, 278 Mass. 578; 60 N. E. 385;

Montgomery v. *Kelly*, 142 Ala. 552; 38 So. 67;
Ex Parte McKenna, 126 Cal. 429; 58 Pac. 916;
Ex Parte Drexel, 147 Cal. 763; 82 Pac. 429;
Ex Parte West, 147 Cal. 774; 82 Pac. 434;
Denver v. *Frueauff*, 39 Colo. 20; 88 Pac. 389;
Hewin v. *Atlanta*, 121 Ga. 723; 49 S. E. 765;
United Cigar Stores Co. v. *Stewart*, 144 Ga. 724; 87 S. E. 1034;
Territory v. *M. A. Grant & Co.*, 18 Haw. 196;
Sperry & Hutchinson Co. v. *State*, 188 Ind. 173; 122 N. E. 584 (1919);
Lawton v. *Stewart Dry Goods Co.*, 247 S. W. 14 (1923);
Sperry & Hutchinson Co. v. *Owensboro* (1912), 151 Ky. 389;
O'Keefe v. *Sommerville*, 190 Mass. 110; 76 N. E. 457;
Opinion of Justices, 208 Mass. 607; 94 N. E. 848;
People ex rel. Atty. Gen. v. *Sperry & Hutchinson Co.*, 197 Mich. 532; 164 N. W. 503 (1917);
State ex rel. Simpson v. *Sperry & Hutchinson*, 110 Minn. 378; 126 N. W. 120;
State ex rel. Hartigan v. *Sperry & Hutchinson Co.*, 94 Neb. 785; 144 N. W. 795;
State v. *Ramseyer*, 73 N. H. 31; 58 Atl. 958;
People ex rel. Marden v. *Dychur*, 72 N. Y. App. Div. 308; 76 N. Y. S. 111;
People ex rel. Apple v. *Zimmerman*, 102 N. Y. App. Div. 103; 92 N. Y. S. 497;
Winston v. *Hudson*, 135 N. C. 286; 47 S. E. 1023;
State v. *Dalton*, 22 R. I. 77; 46 Atl. 234;
Trading Stamp Co. v. *Memphis*, 101 Tenn. 181; 47 S. W. 136;

State v. *Holtgrave* (1921), 58 Utah 563; 200 Pac. 894;
State v. *Dodge*, 76 Vt. 197; 56 Atl. 983;
Young v. *Commonwealth*, 101 Va. 853; 45 S. E. 327.

The proponents of the provisions of Article IV of this Code undoubtedly will urge before this Court that the State of New York exercised its true police powers in the enactment of Section 781 of the Laws of 1933 and of the provisions of this Code. With this contention we take serious issue when we refer to the principles of law and arguments asserted herein with respect to the unlawful delegation of legislative functions by the State of New York to the Federal Government and to the President. The argument is set forth more fully in Point III of this Brief.

The State of New York did not, we submit, exercise its prerogative by legislating in the name of police power. It merely enacted Chapter 781 of the Laws of 1933 as an alleged aid to the Federal Government in the enforcement of the provisions of the Codes adopted pursuant to the National Industrial Recovery Act. The provisions of this Code in the manner of their enactment are quite distinct and clear from the provisions of the statute, to wit, the Milk Control Law of the State of New York which was discussed in *People* v. *Nebbia, supra*. There can be no sincere intimation by anyone, that the State of New York expressly, and under the name of police power, enacted the provisions of Article IV of this Code. *The State Legislature never saw, heard nor read the provisions of this Code.* It came into existence on October 3rd, 1933, in effect November 3rd, 1933, and the apparent law of the State of New York on December 3rd, 1933, by the mere filing of a certified copy thereof. In fact, the operation of this Code is being administered in the State of New York by a non-

State agency, to wit, the National Automobile Dealers Association, a trade association incorporated under the laws of the State of Illinois, with its principal office in the State of Missouri. This Association compiles the figures for the Official Guide Book, and through its agencies, attempts to secure enforcement of the provisions of this Code in the State of New York. What power or right an Illinois corporation can have in the administration of Code provisions in the State of New York, is beyond the conception of the writer! Certainly, no warrant of authority exists in law either under the New York State Constitution or under the Federal Constitution for a foreign corporation—a non-state agency—to enforce and administer New York State Laws against the citizens of the State of New York.

While we realize as we must, that the competitive system is not wholly perfect, it is the only economic system consonant with the spirit of Democratic institutions. Under the National Industrial Recovery Act, we have sought to improve and possibly supplant the system by a new economy based on the theory of benign cooperation. This theory is not new, for it has been tried again and again by all commercial peoples. Economic history is replete with records of its failure. Economic institutions can be torn down and rebuilt, but there is no possibility of reconstructing human nature. We are beginning to understand that when individual groups gather to plan their economic salvation, they are rarely dominated by a broad, social purpose. The natural and thoroughly human objective is to control and regulate the price making process for the benefit of the group rather than the general public. Under this system, there is no redress for the consumer. If we cannot trust the self-interest of the individual in price making, the worst possible substitute is the enlightened self interest of the industrial or trade group.

Our Codes are chiefly charters for the elimination, rather

thun the improvement of competition. We have wandered far from the original purpose of eliminating unfair competition based on starvation wages, unduly long hours and child labor. The prime objective of the so-called business statesmanship, which urged relaxation of our anti-trust laws, has been to limit, abridge and circumscribe price freedom or private contract, by nearly every direct and indirect restraint which human ingenuity could devise. Beyond question our codes tend to foster monopoly and monopolistic practices; and they harass and oppress small enterprise through the economic tyranny of trade majorities. We have largely removed the price making process from the "collective wisdom, error, judgment and mistakes of a free market" and we have placed upon government the impossible task of protective intervention at the crucial points of competition on a million business fronts. If we persist in price fixing, our benign co-operation must be displaced ultimately by a malign paternalism which will arbitrate the economic destiny of all private enterprise.

It is probably not a mere coincidence that the decline in industrial production in 1934 closely followed the practical completion of codification. The plain fact is that our Codes have become complicated mechanisms for artificial, arbitrary and capricious price controls. They have increased price disparities and set up in the business structure a new series of stresses and strains which threaten economic equilibrium. They shackle industry and trade at a time when credit is super-abundant and when deferred demand for the products of industry, due to the depression, is at the highest peak in our business history. They have raised prices, retarded physical production and delayed improvement in employment conditions. We may well paraphrase Rousseau and say: "American enterprise was born free; and everywhere it is in chains."

In all this price fixing experimentation under these Codes, the simple fundamentals of competitive price making have been ignored. The economist defines price as exchange value expressed in terms of money. In other words, it is the monetary expression of the meeting point of supply and demand. We may of course change the monetary yardstick, but that action does not solve the fundamental problem. We should know that unless we can control the supply of and the demand for goods and services, all efforts to fix and control prices are grave economic blunders. This is not esoteric dogma, unless the plain truth is esoteric. More than a century ago, Pelatiah Webster in his Political Essays, said:

> "It is not possible to form a limitation of prices which shall be just and therefore the whole scheme necessarily implies injustice * * * It is not more absurd to limit the precise height to which a ship shall be fixed at a wharf, where the tide is constantly ebbing and flowing. A great force will be required to keep the ship from rising or falling with the tide, and a mighty little use to pay for the trouble; besides the probability of more severe damage which the ship must incur by the application of the necessary force * * *"

By all the artificial price control methods found in the majority of over 600 Codes, prices have been raised, but at the same time, demand over which we have no control, has been choked. These devices are doomed to economic failure because they can operate only to foster special privilege, destroy initiative, and the opportunity for private profit. We cannot safely grant such power to Code groups because, in effect, it is the grant of a power to control prices. Our so-called business statesmanship has created a system which if not promptly abandoned, must ultimately

compel complete governmental control of private business. When that happens, Constitutional Government, as we have known it, will cease to exist.

IN CONCLUSION.

The final decree should be reversed, and the case remitted to the Court below with instructions to grant the relief prayed for by the appellant in its bill of complaint.

Respectfully submitted,

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